IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 46

UNITED MINE WORKERS OF AMERICA, *Petitioner,*

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, ADMX. OF THE ESTATE OF BURSE PHILLIPS, deceased,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HARRISON COMBS
900 Fifteenth Street, N. W.
Washington, D. C.

E. H. RAYSON
R. R. KRAMER
904 Burwell Building
Knoxville, Tennessee

M. E. BOIARSKY
511 Kanawha Valley Building
Charleston, West Virginia

Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner United Mine Workers of America (herein called "UMW") prays that a writ of ceritiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered December 18, 1963, in Case No. 14809, styled *James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Admrx. of the Estate of Burse Phillips, deceased,* Cross-Plaintiffs-Appellees v. *United Mine Workers of*

America, Cross-Defendant-Appellant, wherein the Sixth Circuit affirmed a judgment of the United States District Court for the Eastern District of Tennessee, Northern Division, entered August 2, 1961, against UMW in Phillips' favor[1] for $270,000 and $55,000 for attorneys' fees, aggregating $325,000, after sustaining a jury's conspiracy finding and overruling UMW's motion for judgment notwithstanding the jury verdict and, in the alternative, for a new trial (84-5a).[2]

A certified appendix record in said case, together with the proceedings in the Sixth Circuit, is furnished herewith, in accordance with this Court's Rules.

OPINION BELOW

The Sixth Circuit's opinion appears in Appendix A hereto, pages 1-29a; in the certified record; and it is reported in 325 F. 2d 804 (Adv. Op. February 17, 1964).

JURISDICTION

The Court of Appeals' judgment affirming the trial court was entered December 18, 1963 (A. 29a).[3] This Court's jurisdiction is invoked under 28 U.S.C., Sections 1254(1) and 2101(c).

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[1] The United States District Court for the Eastern District of Tennessee, Northern Division is called "*trial*" or "*district*" court; and the United States Court of Appeals for the Sixth Circuit, "*Sixth Circuit*". Judgment entered was for James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Admx. of the Estate of Burse Phillips, deceased, and the partnership Phillips Coal Company, called "*Phillips*" (84a). *Unless otherwise indicated, all emphases herein are supplied.*

[2] Pagination references are to the printed certified record under Rule 21 of this Court, filed in this Court's Clerk's office.

[3] The abbreviation "A." refers to the appendix to this petition.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

When Phillips as a signatory to the National Bituminous Coal Wage Agreement of 1950, as amended in 1952, 1955 and 1956, failed to perform his covenant therein to pay into the United Mine Workers Welfare and Retirement Fund of 1950 (called "Fund") forty cents per ton on each ton of coal produced for use or for sale, Fund's Trustees instituted an action against Phillips to recover such delinquencies.[4] Contemporaneously with filing an answer therein, Phillips filed a cross-claim against both UMW and the Trustees (19a), invoking jurisdiction under "Title 15 USCA, Sections 1, 2 and 3" (19a) and seeking damages of $100,000 to be trebled under Section 15 of that Title (20a).

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[4] The trial court consolidated for jury trial Trustees' case against Phillips (filed January 6, 1958) with that of Phillips against UMW (47a). The trial court charged the jury it was to decide only whether Trustees combined or conspired so as to unreasonably restrain trade or monopolize commerce and that, upon receipt of the jury's determination of the conspiracy issue, the court would then determine, as a question of law, whether "Trustees are or are not entitled to recover the unpaid royalties" from Phillips (1546-7a). UMW objected to the consolidation (47a).

The jury found Trustees engaged in a combination or conspiracy. The district court, upon Trustees' motion, held "there is no material or substantial evidence . . . to support the" jury finding, set aside the jury verdict, and entered judgment in favor of Trustees for $43,424.22 (83a).

Upon Phillips' appeal (styled *Lewis et al.* v. *Pennington, et al.*, No. 14,810), the Sixth Circuit affirmed (A. 29a). Phillips' Petition for Certiorari is now pending as No. 867 in this Court.

QUESTIONS PRESENTED

1. May a labor union be held a conspirator under the Sherman Antitrust Act where it has achieved an industry-wide, multi-employer collective bargaining agreement, negotiated in accordance with procedures established by law, which results in stabilizing wage rates and working conditions at levels above the ability of some employers to pay?

2. Where a labor union and employer signatories to a collective bargaining agreement obtain from the United States Secretary of Labor, under the Walsh-Healey Act, a minimum wage rate for the bituminous coal industry on coal purchased by federal agencies, is such union activity conspiratorial conduct under the Sherman Antitrust Act?

3. Where a labor union is charged with having conspired with employer groups in violation of the Sherman Antitrust Act when it executed an industry-wide, multi-employer collective bargaining agreement in conformity with injunctive orders of a federal district court, union denials of the conspiracy are uncontradicted, and there is no direct evidence proving the conspiracy, may a court or jury infer the existence of a conspiracy from union activities either sanctioned under law or within the jurisdiction of the National Labor Relations Board, in light of the antitrust immunity of labor unions and the clear proof requirement of Section 6 of the Norris-LaGuardia Act?

4. Was there substantial evidence to warrant the jury's verdict of conspiracy and of damages under the Sherman Antitrust Act?

STATUTES INVOLVED

The statutory provisions involved are Sections 1, 2 and 3, Sherman Antitrust Act (15 USCA 1, 2 and 3); Sections 4 and 6, Clayton Act (15 USCA 15, 17), Section 20, Clayton Act (29 USCA 52); Sections 2, 4 and 6, Norris-LaGuardia Act (29 USCA 102, 104 and 106); the Labor Management Relations Act, 1947 [29 USCA Sections 141, 151, 157, 158(a)(3), 158(b)(1)(A), 158(b)(3), 158(b)(4), 158(e), 185, 187; Fair Labor Standards Act of 1938, Sections 1 and 2 (29 USCA 201, 202); and the Walsh-Healey Act (41 USCA 35-45)].[5]

STATEMENT OF THE CASE

A. THE JUDGMENT APPEALED.

In an action instituted by Fund Trustees to recover unpaid royalties from Phillips, admittedly a signatory to the industry-wide National Bituminous Coal Wage Agreement of 1950, and as amended in 1952, 1955 and 1956, Phillips filed a cross-claim against UMW (19a), seeking treble damages under the Sherman Act (15 USCA 1, 2, and 3),[6] based upon an alleged conspiracy between UMW, Fund Trustees, and certain major coal companies (not made parties to the cross-claim) to force small mines out of business.[7]

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[5] These statutes are referred to herein as *Sherman, Clayton, Norris-LaGuardia, Taft-Hartley, Fair Labor Standards,* and *Walsh-Healey,* respectively.

[6] The pertinent provisions of these sections are to be found in Appendix C to this brief, A. 48-9a.

[7] It required an answer (filed February 14), an amendment (filed March 5), a second amendment (filed March 24) and a third amendment (filed June 26) to finalize Phillips' theory of the alleged conspiracy (11a, 21a, 26a, 30a).

UMW denied the conspiracy charges, alleged that under Section 6 of the Clayton Act (15 USCA 17) negotiation and execution of the several Agreements by it as a labor organization and its conduct in their enforcement did not constitute *Sherman* violations, and asserted "all of the acts done by UMW" herein "were motivated by legitimate labor goals" to secure union standards of wages and working conditions for its members (58-59a).[8]

In a jury trial recorded in a transcript of 3,539 pages and 175 exhibits, which commenced April 11, 1961, and was submitted to the jury on May 17, which on May 19, returned a verdict in Phillips' favor, responsive to a submitted verdict form (85a)[9] that UMW had engaged in a "combination or conspiracy so as to unreasonbly restrain trade . . . beyond the exemption created by the anti-trust statutes to a labor organization" as Phillips had alleged (85a). UMW motions for judgment n.o.v. or for new trial (64a) were overruled (83a). Judgment for $270,000 (trebling the jury's damage award of $90,000) and $55,000 for attorneys' fees, favorable to Phillips, was entered (83-4a; A. 32a).

Upon appeal the Sixth Circuit affirmed the judgment (A. 29a).

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[8] UMW's answer and amended answer are found in the certified record at pp. 38-40a.

[9] The verdict form read (1578a): "Did the cross defendant, UMW, engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states outside and beyond the exemption created by the anti-trust statutes to a labor organization as alleged by cross plaintiffs, Phillips Brothers' Coal Company."

B. THE CONSPIRACY ISSUE

a. In the Trial Court

The conspiracy's formation, Phillips charged, occurred when the 1950 Agreement was executed, its purpose being to stabilize the bituminous coal industry's economics by eliminating therefrom small producers unable to pay high wages and welfare fund royalties and the conspirators knowing and intending these smaller companies would go out of business by reason of such inability (1542a), thereby leaving the industry's business to major coal companies.[10]

According to Phillips, the conspiracy included UMW agreement to surrender to operators its policy of controlling working time at the mines, UMW's acquiescence for large coal companies to increase productivity through mine mechanization; and UMW's willingness that mines incapable of mechanization be closed despite the resultant loss of UMW membership (31a).

In exchange, as Phillips theorized, major coal companies agreed not to object to increased wages and welfare fund payments, subject to operator ability "to match those increases by increased productivity through mechanization" (32a), and to permit UMW to control the Fund and dominate the industry's employees.

The conspiracy's purposes, Phillips theorized, were to be achieved through the National Agreement's use (1539a). Lack of industrial strife in the industry following the 1950 Agreement with attendant increases in wages and welfare fund payments, increased UMW

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[10] Theories advanced by Phillips are found in the certified record, pp. 49-56a, 1538-43a. Theories of UMW to defeat recovery by Phillips are found at pp. 57-60a, 1543-45a.

organizing activities, the Agreement's land-lease and protective wage clauses, UMW-operator efforts to obtain a Walsh-Healey Act minimum wage determination and to have TVA comply therewith and mechanization of mines were among the elements, Phillips contended, which proved the conspiracy Phillips alleged was formed in 1950.

UMW officials denied the charged conspiracy and denied making any agreement other than the 1950 Agreement; and these denials were not disputed. Although the trial court permitted the jury to hear testimony as to each of the elements enumerated above, and the jury in a *general verdict* found UMW had conspired outside and beyond labor's immunity under *Clayton's* Section 6, without delineating upon which of the elements it premised the finding and without specifying with whom UMW supposedly had conspired, upon post-verdict motions for judgment n.o.v. or for new trial, the trial court tacitly rejected all of those elements as proof of the alleged conspiracy.[11]

It justified the jury verdict against UMW *solely* upon its statement that *"There is some proof . . . that Union representatives and large coal operator representatives discussed stabilization of prices at one time or another during the critical periods referred to in the cross-claim"* (87a).

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[11] The trial court noted "Trustees testified positively that the Union did not dominate or control the Fund" and "The evidence is not sufficient to show the contrary" (98a). Likewise, the trial court expressly rejected Phillips' contention that UMW control of the Fund and domination of the employees were to be achieved by the requirement that union membership was a prerequisite for obtaining Fund benefits after 1950, that Trustees required pensioners to picket for UMW in order to obtain or retain Fund benefits and that Trustees held out to industry employees the Fund was under UMW control (98a).

The Trial Court Declared That 1950 Court Proceedings and Negotiations Accordant Therewith Weakened, If Not Destroyed, Phillips' Conspiracy Allegations. Its Opinion Ignores That Evidence

Federal court proceedings which preceded the 1950 Agreement's execution, on UMW's motion for directed verdict (1524a), occasioned the trial court's comment the 1950 court proceedings and negotiations pursuant thereto *"put a grave burden upon"* Phillips, expressing they *"greatly weaken, if not destroy"*, Phillips' conspiracy charges (1524-33a). They indicated to the trial court *"these parties were acting through regular channels"* and *"were bargaining with each other"* and *"weren't acting in concert"* but acted *"because they were made to act"* (1527-8a).

The trial court's dubiety finds expression in its further statement, *"This is not an easy case"* but *"a very complex"* one, as well as its recognition that the union's motion for directed verdict is a *"serious motion and is a debatable motion, certainly"* (1532-33a).

Notably, in denying UMW's post-verdict motions, when it assigned the sole basis for upholding the verdict, the district court failed to explain away its concern noted above.

b. In the Sixth Circuit

UMW's appeal was argued October 20, 1962 (A. 29a). *Fourteen months later,* on December 18, 1963, the Sixth Circuit affirmed the district court's judgment (A. 29a).

The Sixth Circuit abandoned and ignored the district court's reason for sustaining the jury verdict. Its opinion makes no mention of the *1950* federal district court proceedings and directives and the negotiations antecedent to the 1950 Agreement's execution which had so grossly concerned the district court nor does it mention the trial court's concern or dubiety.

The Sixth Circuit noted, *without challenge,* UMW's contention there was no direct evidence of the alleged

conspiracy (A. 12a). Notably, in avowing "the following background was given to the jury" (A. 12a), the Sixth Circuit stated *as facts* the *theories advanced* by Phillips and related to the jury *as theories* (1538-43a). It did not undertake a "review of the evidence in detail"; instead, it chose what it regarded as some *"principal factual aspects"* which led to its conclusion "there is *substantial evidence*" to support the jury verdict (A. 11-12a). Among these are:

1. UMW's Knowledge of The Effect of Increased Labor Costs on "Weaker" Companies.

Pointing to wage increases of $9.50 per day during an eight-year period (1951-1958 since the 1950 Agreement was executed) and the 1952 increase of welfare fund payments from 30¢ to 40¢ per ton (since which time no increase had been had in such payments), and though there is no record basis that the wage increases were too high, the Sixth Circuit observed, *"We think the evidence supports" Phillips' contention the "Union knew that the weaker companies could not meet the increased costs of wages and welfare fund payments required by the successive wage agreements and that they would fall by the wayside by reason thereof, and that the increased costs in the successive agreements were geared to the abilities of the major coal companies to mechanize and not have their profits affected by the increased costs"* (A. 15a).

2. The "Land-lease" and "Protective Wage" Clauses in the National Agreement.

Two other "principal factual aspects" relied upon by the Sixth Circuit in warranting the jury's inference are the so-called "land-lease" clause in the 1952 Agreement and subsequent amendments and the "protective wage" clause in the 1958 Agreement. (A. 16-17a).

Of the "land-lease" clause the Sixth Circuit declared

(A. 16a), "The evidence showed that there was a large reserve of coal lands owned or held under lease by the major coal companies" and that "It is argued that this provision barred the small coal companies that could not pay the union wage and the royalties to the Welfare Fund from operating this land and that there was but little good coal land available to them as a result of this provision".

The "protective wage" clause, as the Sixth Circuit stated, "contained a clause which provided that the signatory operators would not buy, sell or deal in coal mined by companies that did not pay the same labor costs as contained in the Wage Agreement" (A. 16-17a). Continuing the Sixth Circuit declared (A. 17a), "The major coal companies had the practice of frequently buying coal from the smaller companies to apply on their large long-term contracts. This market was eliminated for those small companies that could not operate under the provisions of the Wage Agreement."[12]

3. UMW Investments in West Kentucky Coal Co. and Nashville Coal Co.

The Sixth Circuit's opinion notes UMW's investments in West Kentucky and its subsidiary, Nashville Coal, concluding "it was not unreasonable for the jury to conclude" UMW's purpose was "to have a very material voice, if not the dominant one, in determining the policies of these two major coal companies" (A. 18a). This use of UMW investments and its

[12] The protective wage clause was in the *1958* Agreement executed December 3, *1958; it did not become effective until April, 1959 (1207a) which does not fall within the stipulated (63a) damage period of time involved in this case, such period ending December 31, 1958;* hence, it could not be regarded as having any probative value of the alleged conspiracy. Pertinently, Phillips did not execute the 1958 Agreement.

conclusion as a basis for the jury's conspiracy finding are challenged by undisputed facts (492a, 585a, 591-4a, 1121a, 1123-28a, 1444-45a, 1146a) and the district court's jury charge that UMW had a right to make such investments and it was not a *Sherman* violation so to do (1557a).

4. UMW Efforts To Have the U. S. Secretary of Labor Establish Minimum Wage Rates for Coal Industry Under Authority of the Walsh-Healey Act and to have TVA Comply With Them In Government Coal Purchases.

Pointing to efforts of UMW and of two major coal producers in obtaining a determination of minimum wage rates for the coal industry by the Secretary of Labor under the Walsh-Healey Act to apply to federal government's purchases of coal, their efforts to have TVA comply with such minimum rates, and an address of Secretary of Labor Mitchell at a 1956 UMW Convention, the Sixth Circuit held "it was a reasonable deduction" for the jury to "make that the wage determination for the coal industry under the Walsh-Healey Act... materially and adversely affected the operations of Phillips in the important TVA market, thus contributing to the elimination of the company as a competitor to the large producing companies operating in that area . . ." (A. 20-21a).

The Sixth Circuit rejected UMW's contention that evidence concerning the *Walsh-Healey* determination was permissive conduct under *Eastern Rr. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), saying (A. 24a), "We do not construe the *Noerr* ruling as creating an unlimited exemption to Sections 1 and 2 of the Sherman Anti-trust Act. We believe that the *Noerr* ruling had reference to conduct which in good faith looked to the enforcement of the law or a modification of an existing policy, unaccom-

panied by a purpose or intent to further a conspiracy to violate a statute. It is the illegal purpose or intent inherent in the conduct which vitiates the conduct which would otherwise be legal".

Likewise the Sixth Circuit placed the Secretary of Labor, who did no more than carry out his statutory duty, in the role of a co-conspirator.

C. THE ISSUE RELATING TO THE ADMISSION OF EVIDENCE AND JURY INSTRUCTIONS CONCERNING UMW'S EFFORTS TO OBTAIN A WALSH-HEALEY MINIMUM WAGE DETERMINATION AND TO HAVE TVA COMPLY THEREWITH.

Both the trial court and the Sixth Circuit rejected UMW's complaint (453-8a) that admission of evidence concerning the *Walsh-Healey* wage determinations, public hearings thereon, the issuance of an order setting such a wage rate, and Secretary of Labor Mitchell's statements at a UMW Convention concerning the determination, as well as UMW and operators efforts to have TVA comply with the wage rate so determined, was prejudicially erroneous under *Noerr,* as was the trial court's instructing the jury such efforts were valid *unless* they produced a trade restraint (1558a, 1587a) and the refusal to give a UMW proffered instruction omitting the "unless" provision.

THE FACTS

1. Phillips' Mining Operations and Execution of the UMW Agreement

Without UMW solicitation, Phillips, a partnership consisting of Raymond E. Phillips, Burse Phillips and James Pennington, organized in 1953 with a capital of $27,000, employing about 8 employees (175a, 181-2a), and conducting a coal mine stripping operation in Campbell County, Tennessee, executed the 1952 Agreement October 1, 1953 (117a, 178a). None of Phillips' employees then belonged to UMW (179a). Phillips again executed the 1952 Agreement in 1955, and there-

after executed the 1953 and 1956 Agreements. Its employees voluntarily joined UMW (229a).

2. UMW Officials Deny Any Conspiracy

Undisputed are the denials of John L. Lewis and John Owens, UMW's President and Secretary-Treasurer, respectively, and chief union negotiators in the 1949-50 bargaining sessions, of any agreement other than the 1950 Agreement and amendments thereto (1189a), or UMW-operator plan or understanding of concerted action (1189a, 1224-5a) or UMW agreement with any coal operator to influence pricing or operations of mines to eliminate small, or any other, operator from the mining industry (1139-40a), or that the 1950 Agreement "would be used" therefor (392a).

3. The 1949-50 Negotiations and Federal Court Decrees Antedating Execution of the 1950 Agreement

From UMW's inception in 1890 its objectives have included improved standards of working and living conditions, achieved in a pattern of multiple-employer collective bargaining (1097a, 1099a).

The 1946 Agreement, which had provoked operator litigation against UMW, expired June 30, 1949. A successor, industry-wide, multiple-employer agreement (National Bituminous Coal Wage Agreement of 1950) was executed by UMW and operators March 5, 1950. Interim bargaining negotiations focused around three issues carried over from the 1948 Agreement, namely: operator complaint that (1) the union-shop clause in the 1948 Agreement did not comply with Taft-Hartley's requirements; (2) the welfare fund could not be administered for UMW members only, as operators claimed that Agreement provided; and (3) the 1948 Agreement's "able and willing" and "memorial period" clauses, operators complained, gave UMW control over working time of the mines.

The Injunctions of February 11, 1950.

These complaints, resulting in failure of collective bargaining processes to achieve a labor contract, caused NLRB to issue and process an unfair labor practice complaint against UMW and its President, and a Board Regional Director and United States Attorney General, harmonious to a Presidential Board of Inquiry Report, severally to seek injunctive relief, responsive to which the federal district court, in two separate orders on February 11, 1950, enjoined UMW from insisting that (1) a successor agreement require UMW membership of employees "without compliance" with Taft-Hartley's requirements, (2) the agreement provide for a welfare and retirement fund to be administered for UMW members only and (3) the agreement contain the "willing and able" and "memorial period" clauses and *ordered operators and UMW* "engage in free collective bargaining *in good faith*" to resolve their disputes and "make every effort to adjust and settle their differences" as Taft-Hartley contemplated (1476-8a).

Under district court scrutiny,[13] NLRB and Attorney General surveillance, with assistance of members of the Presidential Inquiry Board, *and with UMW's bargaining abilities circumscribed by judicial restraints,* UMW and operators, bargaining in good faith, achieved the 1950 Agreement, which, obedient to the February 11, 1950 injunction, created a union-security clause to comply with Taft-Hartley, made Fund benefits available to signatories' employees *regardless of UMW* membership, and eliminated the

[13] During negotiations, the district court, in chambers, with some parties present, discussed negotiations and warned any negotiator leaving negotiating conferences would do so at peril (1505a).

"able and willing" clauses and amended the "memorial period" clauses.

UMW's full obedience to the district court's injunctive commands is manifested in dismissal of all court proceedings upon motion of the federal agencies involved (1480a, 1483-86a), and in the district court's absolving UMW and Lewis of charges they had contemned the court's injunctive mandates (*U. S.* v. *Int. Union, UMWA*, DC, D.C., 1950, 89 F. Supp. 179).

4. Mine Mechanization Was An Existent Fact Prior to the 1949-50 Negotiations and Was Not An Issue in That Bargaining Period

Phillips' contention the coal industry's mechanization resulted from conspiracy and that increases in wages and royalty payments were tailored to meet major coal companies' abilities to pay such increases (113-14a) overlooks the *undisputed fact that, prior to 1950, mechanization was a normal procedure in the coal industry* (616a, 746-47a, 748a). In 1940 *mechanically loaded coal amounted to 35.4%* of all underground production and *by 1949* this had *increased* to 67% (1724a). Likewise, of total production *22.2% was mechanically cleaned* and this was *increased to 35.1%* (1724a) in 1949. *Indeed, Phillips' mining operations were highly mechanized* (211a).

UMW never opposed mechanization (1130a, 1218a), because of the free enterprise system and *UMW's belief that mechanization is a management prerogative to buy such equipment as management chooses and UMW does not "attempt to abridge it"* (1214a, 1223a).

"Had the coal industry not increased productivity with its attendant lowering of costs", it would have succumbed to its competitors—world competition in

coal and competitive fuels such as oil, gas and diversified fuels made from coal or petroleum bases (1130-1a). The 1950 Agreement was executed by operators, according to *Phillips' witness* George H. Love, because "it was our best judgment to conclude the contract and stop losing coal business to other fuels" (545a).

The need of lower cost production through mechanization is shown in the coal industry's loss of markets when coal's share of the national energy market declined from 46.5% in 1945 to 36.9% in 1949 and from 34.8% in 1950 to 23.1% in 1958 (1714a, 113-34a).

In the period 1950-58, when the coal industry invested heavily in new machinery and equipment, coal production increased from 6.77 tons per man day in 1950 to 11.33 tons in 1958 (1724a). In the same period, wages rose from an average of $16.08 per day in 1950 to $24.16 average in 1958.[14] But, as output per man increased as a result of mechanization, UMW insisted this higher productivity justified a higher rate.

5. The Pattern of Collective Bargaining in the Post-1950 Agreement Period Accords With National Labor Policy

Whereas Phillips argued that the industrial peace which followed the 1950 Agreement's execution[15] and

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[14] U. S. Dept. of Labor, Bulletin No. 1305, Technological Change and Production in the Bituminous Coal Industry, 1920-60, p. 118, Table 27A.

[15] In the Sixth Circuit, UMW argued that in the 1940's UMW had been the target of condemnation by the three branches of the federal government, by coal operators and by segments of the public and that a contrasting peaceful, orderly pattern of collective bargaining, consonant with Taft-Hartley's policy of eliminating industrial strife (29 USCA 141), should not serve as a basis to stamp UMW as a *Sherman* conspirator. To do so, UMW stressed, would place the federal judiciary in the posture of telling UMW it dare not follow the industrial peace proclaimed in the Taft-Hartley Act.

the fact miners achieved wage increases of $9.50 per day over the eight years following the 1950 Agreement's execution and a 10¢ royalty increase in 1952 (which has since remained unchanged) establish the alleged conspiracy, yet, Phillips' argument ignores that in the *1946-48* period miners obtained $4.05 per day increase, establishment of a welfare fund with royalty increased from the original 5¢ per ton in 1946 to 20¢ in 1948, in addition to a reduction in hours per work day (266a, 267-8a). In addition, the 1950 Agreement increased wages 70¢ a day and royalty payments to the Fund to 30¢ per ton.

Phillips' argument that differences in bargaining patterns before and after the 1950 Agreement's execution show the conspiracy ignores the undisputed facts that, while operators formed the Bituminous Coal Operators' Association (called "BCOA") to promote stable industrial relations on a national basis and representing coal producers and associations in Pennsylvania, Illinois, Indiana, Northern West Virginia, Ohio and Virginia (394a), signatory operators include numerous other coal associations and coal producers with whom UMW bargained long prior to 1950 operators select their representatives, and UMW meet with such persons as the operators advised represented it as Taft-Hartley's Section 8(b)(3) [29 USC 158(b)(3)] commands (1247-48a).

6. The "Land-Lease" and "Protective Wage" Clauses in the National Agreement

Two other of the "principal factual aspects" relied upon by the Sixth Circuit to warrant the jury's inference are the so-called "land-lease" and "protective wage" clauses of the National Agreement which the trial court told the jury were lawful and not violative of

Sherman, provided they were inserted at UMW's insistence for legitimate labor goals and were "not the result of an agreement with large coal operators to drive small operators out of business" (1558a). Both clauses sought legitimate labor goals (448a, 1109-10a, 1206a, 1207a). Both were insisted upon by UMW and resisted by operators (1111a, 1201a, 1205-6a).

Under the land-lease clause operators agreed the Agreement "covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production. The said operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this Agreement" (445a, 1200a, 1739a).

This provision has its genesis in a 1943 Agreement when it read, "The operators agree they will not lease *any operating mines* subject to the supplemental agreement as a subterfuge for the purpose of avoiding the provisions of this supplemental agreement" (1198a). It so appeared in the 1945 National Agreement (1199a). In the 1952 Agreement and subsequent amendments the provision was expanded to cover "coal lands" owned or held under lease by operators or acquired by them. UMW officials' undisputed testimony is that its purpose was *solely* to protect "wage standards and the conditions of the working miner" (1109a, 1201a), to prevent coal operators from repudiating their agreement, and to tighten up the processes of collective bargaining (1201a).

The Sixth Circuit declared (A. 16a), "The evidence showed that there was a large reserve of coal lands

owned or held under lease by the major coal companies" and that "It is argued that this provision barred the small coal companies that could not pay the union wage and the royalties to the Welfare Fund from operating this land and that there was but little good coal land available to them as a result of this provision", although T. Reed Scollon, Chief of Division of Bituminous Coal, Bureau of Mines, U. S. Department of Interior (1280a) testified that at the present rate of coal consumption "there are proved reserves of coal for about *seventeen hundred years*" (1310a) and that in 1958 there were in excess of 8,000 mines producing coal for consumption, of which number more than 2,000 were in Phillips' class (Class 5) and almost 5,000 small producers of less than 10,000 tons annually, all sharing in such coal reserves (Ex. 151-A, 1719a).

The "protective wage" clause's purposes, undisputed evidence shows, had to do with "substandard mines" because of their structure and inefficiency (448a). The clause "is a continuation" of UMW's efforts over years to have an agreement which would prevent operators from vitiating the agreement signed by them "by entering into some kind of a lease or by purchasing coal, closing their own mines down, from sub-standard mines that were paying sub-standard wages" (1206-8a, 1110a).

7. UMW and Operators' Efforts Obtained Walsh-Healey Minimum Wage Determinations and Sought to Have TVA Comply Therewith

In 1936, Congress enacted the Walsh-Healey Act whose purpose this Court avowed is "to use the leverage of the government's immense purchasing power to raise labor standards".[16]

In 1955 and 1958 UMW, Consolidation and other coal companies petitioned United States Secretary of Labor Mitchell to promulgate a minimum wage [not prices (465a)] for the bituminous coal industry on coal purchased by government agencies (457-8a, 1625a, 1634a); public hearings at which both UMW and operators representatives testified (458a, 1634-8a) resulted in the Secretary of Labor's orders setting a prevailing minimum wage for coal industry employees (466a, 1620-1a).

At the 1956 UMW Convention (467a), Secretary Mitchell, introduced by John L. Lewis, in a speech, said: "As you know, about a year ago the Secretary of Labor, for the first time in history, found a minimum wage in the coal industry which controlled the wages that were to be paid to workers who worked on government contracts.[17] We purposely sought that determination in order to exclude from government bidding those non-union mines which are a detriment to the industry" (466a). Mitchell noted that coal was "one of our basic resources" and determination of the minimum wage was "for the benefit of our national

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[16] (1626-7a, citing *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501 and *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940).

[17] Secretary Mitchell's determination was affirmed in *Ruth Elkhorn Coals, Inc.* v. *Mitchell, Sec'y of Labor*, D.C. Cir., 248 F. 2d 635 (1957), cert. den. 355 U.S. 953.

security" as well as benefit of the worker and the fair employer (468a), and that in the national interest "it is necessary for us to see that those operations which can produce coal quickly and efficiently are kept alive to the extent possible by government purchasing in peace time" (469a). Mitchell told the Convention he was investigating if TVA was evading the Walsh-Healey determination, with assurances of correction, if any. Mitchell also stated he believed the enforcement policy to be "in the interest not only of the worker but is in the interest of the fair employer to prevent the chiseling, nonunion employer from competing in the market place with fair employers who hire union labor" (467a). Continuing, Mitchell noted that it was likewise "for the benefit of our national security" because when strip and non-union mines "which pay people a miserly wage exist and deprive union-operated mines of business, you are thereby reducing your strategic potential in time of emergency. So, it is our job as government officials to see to it that the potential production is kept at the highest possible level" (468a).

In 1958, upon request of UMW and operators and after hearing thereon, the Secretary of Labor raised the prevailing wage in the coal industry 50¢ an hour (470-3a, 1634a).

UMW criticized TVA's paying "lesser and lesser amounts for" coal and using the tremendous influence of TVA's purchases of coal "*to decrease the living standards of the men*" (1625a) "*and ignoring safety standards and health conditions . . .*" (1627a). It was not a "question of union or non-union mines" (1632a).

UMW criticized TVA's policy of purchasing coal on contracts of less than $10,000 (474-6a). A UMW rep-

resentative attended a meeting in March, 1958, as did TVA directors, representatives of Southern Coal Producers Association, Southern Coal Sales and Inter-Mountain Coals, when coal producers requested TVA obtain most of its coal on term contracts rather than the spot market (781-3a).

At a March 20, 1958 meeting coal company representatives suggested TVA "limit [its] spot purchases to approximately ten per cent of [its] total requirements" (832-3a). UMW urged TVA officials *"to patronize those concerns that paid the American standard of wages"* and that TVA comply with Walsh-Healey requirements in awarding contracts (1138-9a).

The Sixth Circuit (*ante*, p. 12) regarded these activities as circumstantial evidence warranting an inference of a conspiracy, despite this Court's contrary holding in *Noerr* (365 U.S. 127).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A CONSTRUCTION OF THE SHERMAN ACT THAT A VIOLATION THEREOF CAN BE PREDICATED UPON THE EXERCISE OF LEGITIMATE UNION OBJECTIVES AND THE EXERCISE OF COLLECTIVE BARGAINING TECHNIQUES LOOKING TOWARD THE REALIZATION OF IMPROVED WAGE AND WORKING CONDITION STANDARDS, THEMSELVES PROPER AND LEGAL UNDER NATIONAL LABOR POLICY.

The Sixth Circuit has devised a new and unusual device by which to nullify totally and render meaningless the immunity granted labor organizations under Section 6 of the Clayton Act (15 USCA 17) and to render the right of collective bargaining illusory and "the road to prison", condemned in *U. S.* v. *Hutcheson*, 312 U.S. 219, 234-5. It has done so by employing a lawfully-obtained collective bargaining agreement and

legally-accomplished union objectives of higher standards of wages and working conditions permissible under national labor policy, together with union activities heretofore judicially professed to be outside of *Sherman's* scope, as components of circumstantial evidence from which a jury may find a union to have conspired in violation of *Sherman*. To achieve its results the Sixth Circuit has evaded consideration not only of the immunity section but also the clear proof requirement of *Norris-LaGuardia's* Section 6 (29 USCA 106), and prior decisions of this Court and national labor policy as expressed in the Taft-Hartley Act (29 USCA 141 et seq.).

While *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, declared that to some undefined extent labor unions are subject to *Sherman* (p. 488), it enunciated that under *Clayton's* Section 6, restraints on the sale of employees' services are not conspiracies outlawed by *Sherman* (pp. 502-3). *U. S.* v. *Hutcheson*, 312 U.S. 219, 231, made clear a union's liability under the antitrust laws "is to be determined only by reading" Sherman, Clayton and Norris-LaGuardia Acts "as a harmonizing text of outlawry of labor conduct."[18] Even *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797, which brought within *Sherman's* scope union "activities for the purpose of 'employer-help' in controlling markets and prices" (325 U.S. 808), recognized that *Sherman's* policy was "to preserve a competitive business economy" *with "the rights of labor to organize to better its conditions through the agency of collective*

[18] Pertinent provisions of these statutes appear in Appendix C hereto, A. 48-54a.

bargaining" (325 U.S. 806). When the union acts alone in its own self interest for betterment of its members, independent of nonlabor groups intent upon violating anti-monopoly laws, *Allen Bradley* makes clear its acts are sheltered from penalties imposed under such laws.

The Sixth Circuit's conclusion, approving the jury finding of a conspiracy against UMW, is offensive to that test for it stands for the proposition that a union, acting with employers *as it must in the discharge of its collective bargaining function,* restrains trade by exercising collective employee rights protected by *Taft-Hartley's* Section 7 (29 USCA 157) when, in consequence of the exercise of those rights, certain employers are excluded from an industry engaged in commerce.

The Sixth Circuit's Use of UMW Knowledge That Weaker Companies Would Go Out of Business Because of the Inability to Pay Labor Costs in the UMW Agreement Collides With This Court's American Steel Foundries and Apex Cases

The Sixth Circuit's declaration that UMW knowledge "that the weaker companies could not meet the increased costs of wages and welfare fund payments required by the successive wage agreements, and that the increased costs in the successive wage agreements were geared to the abilities of the major coal companies to mechanize and not have their profits affected by the increased costs" was a basis for upholding the jury's conspiracy verdict against UMW is challenged by pronouncements in *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, and *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469.

The primary purpose of organizing people into trade unions is to eliminate wage competition. Professing that "Union was essential to give laborers opportunity to deal on equality with their employer", this Court in *American Steel Foundries* sanctioned its extention beyond one employer, saying, to render a union "at all effective, employees must make their combination extend beyond one shop" and continuing, "It is helpful to have as many as may be in the same trade . . . united, because, in the competition between employers, they are bound to be affected by the standard of wages of their trade" (257 U.S. 209).

To give purposeful content to *Clayton's* Section 6, *Apex* rejected restraints on the sale of employees' services as violative of *Sherman* "however much they curtail the competition among employees" (310 U.S. 503). Though recognizing that "successful union activity, as for example, consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards", nonetheless this Court continued in *Apex* (310 U.S. 503-4):

> *"Since in order to render a labor combination effective it must eliminate the competition from non-union made goods . . . an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."*

But, what *Apex* avows to be permissive under *Sherman*, the Sixth Circuit antithetically condemns, averring that if UMW knew that weaker coal producers

would be forced out of the industry because of inability to meet increased labor costs, such knowledge would supply the requisite proof of the alleged conspiracy. Singularly, while *Apex'* holding (310 U. S. 503) is expressly made accommodative to the immunity given labor unions under *Clayton's* Section 6 (15 USCA 17), the Sixth Circuit ignores both *Apex* and the immunity[19] in considering the instant point. *U. S.* v. *Hutcheson,* 312 U.S. 219, 232, teaches that whether trade union conduct constitutes a *Sherman* violation depends upon reading *Sherman* and other federal labor statutes as "interlacing statutes". This is precisely what the Sixth Circuit failed to do.[20]

The full effect then of the Sixth Circuit's holding, if a labor union is to avoid the charge of a *Sherman* conspiracy, is that wages and working conditions in a collective bargaining agreement must be restricted to those which the least efficient and the least successful coal operator in the industry could afford—a result totally inconsonant with UMW and all other legitimate unions' objectives and with national labor policy as

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[19] The only reference the Sixth Circuit made in its opinion to the immunity provision is in its statement that since *Allen Bradley* and other cases, the exemption exists only where a union acts alone in furtherance of its own purposes, but not where it combines with a nonlabor group to restrain competition in or monopolize marketing of goods in interstate commerce (A. 9a).

[20] Only recently Mr. Justice Goldberg, in a concurrence, in which Mr. Justice Brennan joined, of *Los Angeles Meat Etc. Union, Local 626* v. *U. S.*, 371 U.S. 94, 157, 158, observed that resolution of antitrust violations concerned, "consideration of federal labor policy, the scope of the antitrust exemption afforded labor organizations by Sections 6 and 20 of the Clayton Act and the Norris-LaGuardia Act, as interpreted by United States v. Hutcheson, 312 U.S. 219 . . ." This challenges the Sixth Circuit's citation (A. 9a) of *Los Angeles Meat Union.*

provided for in the Clayton, Norris-LaGuardia, Taft-Hartley, as now amended, the Walsh-Healey and Fair Labor Standards Acts and federal decisional law implementing those statutes. Phillips' own operation demonstrates how fallacious is the Sixth Circuit's views, for, both *before and after* UMW organized Phillips' operation and it became a contract signatory, Phillips' wage rate was substantially less than the standard set for the industry by the UMW agreement (212-13a). It used this cost advantage to engage in price cutting activities to deprive unionized operations of business. Phillips, with the Sixth Circuit's imprimatur, would reestablish the right to compete upon the basis of substandard wages and working conditions in producing goods for interstate commerce. Federal legislation was enacted to eliminate that very competition. Under the Sixth Circuit's views, if permitted to stand, parties negotiating a collective agreement will not sit at the bargaining table alone. One or more invisible parties will also attend. He or they will be "smaller", "weaker" or "competing" employers; and before signing the bargainers must reckon with the fact that these invisible strangers may not be able, or indeed willing, to meet increases in labor benefits and labor costs which the bargaining may produce. Any such unwillingness or inability may become a basis for an alleged *Sherman* violation.

Since wages are a significant element of costs in virtually all industries, it is necessarily foreseeable that elimination of competition in wages will reduce the area of costs within which competition exists and will have a tendency to eliminate from an industry those competitors who, for one reason or another, are dependent for survival on preservation of a more favor-

able employment cost structure than their competitors. *Apex* took cognizance of these economic facts and held that such indirect restraint was not within *Sherman's* purview.

The Sixth Circuit's Opinion Conflicts With Congressional Intent of Legislation Following Apex and Allen Bradley Which Shows Congress' Purpose To Be That Union Activities Pertaining to Organizing and Collective Bargaining Were Not To Be Regulated by Sherman

In 1947, following both *Apex* and *Allen Bradley*, Congress enacted *Taft-Hartley*. One of its avowed purposes was to regulate union conduct which prevented "the free flow of goods . . . through strikes and other forms of industrial unrest or through concerted activities . . ." (29 USCA 151).[21] Significantly, its declaration of policy included recognition of the need for collective action because in its absence there exists inequality of bargaining power causing commerce to be burdened by "depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within . . . industries." Enforcement of this code regulating union activities was committed to the National Labor Relations Board; and for activities for which Congress determined a union should respond in damages, it made specific provisions in Sections 301 and 303 of that Act (29 USCA 185. 187) [A. 61a]. In this enactment Congress affirmed *Apex'* judicial declaration of its purpose not to regulate union behavior attendant with union organizing and collective bargaining under *Sherman*.

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[21] The pertinent provisions of 29 USCA 151 are to be found in Appendix C hereto, A. 55a.

This Congressional intent is emphasized by *Taft-Hartley's* Section 8(b)(4) [29 USCA 158(b)(4)] making it unlawful for a union to engage in product boycotts and Section 8(e) [29 USCA 158(e)] making it unlawful for both employers and unions to agree to engage in such product boycotts, as enacted in 1959. These statutes stress the Sixth Circuit's fallacy in employing the land-lease and protective wage clauses as bases warranting the jury's conspiracy finding.[22]

The Sixth Circuit's Opinion Is Offensive to National Labor Policy in Its Failure to Concern Itself With Implementing Clayton's Immunity Provision and the Clear Proof Requirement of Norris-LaGuardia

The antitrust immunity of a union under *Clayton's* Section 6 exists for the precise purpose of preventing juries and courts alike from inferring the existence of a conspiracy on a union's part to restrain trade from sanctioned conduct. Otherwise, as the Sixth Circuit has achieved in the instant case, lawful exercise of collective employee rights would be converted into a conspiracy to restrain trade by imputing a purpose to obtain those effects on inefficient employers which are but the by-product of UMW's pursuit of its members' interests. In short, the problem is one of dual effect. When a union secures higher wages for its members, it benefits its members but may injure some employers. If its conduct can be adjudged in light of the effect on the injured employers, a union's immunity from *Sherman* is wholly illusory. So long as a union acts as agent of employees exercising collective rights guaranteed by *Taft-Hartley's* Section 7, it is not sub-

[22] These statutory provisions are found in Appendix C hereto, A. 59-60a.

ject to liability under *Sherman* whatever the forseeable economic consequences of its act.

Each of the factors before the jury falls within the scope of activities permitted or regulated by *Taft-Hartley's* Sections 7 and 8. Clearly, no inference of conspiratorial conduct may be derived therefrom. *Hutcheson's* command that a *Sherman* violation be determined only by reading *Sherman, Clayton* and *Norris-LaGuardia* as "interlacing statutes" (p. 232) and that sanctioned-conduct under *Clayton* could not serve as a predicate for a *Sherman* violation, is equally apposite to conduct which finds sanction under *Taft-Hartley's* Section 7, and thus renders unavailable the use of an inference of conspiracy from permissible activity. Indeed, *Allen Bradley* (325 U.S. 806) proclaims that conduct permitted by federal statutes "is not to be declared a violation of federal law".[23]

Attainment of industrial peace in the coal industry has been a cherished federal government objective. Yet, in its accomplishment the Sixth Circuit finds an illegal conspiracy and that which Congress mandated in protection of the public interest has become a litigation trap for UMW.

But the thrust of the Sixth Circuit's opinion does not impinge upon UMW alone. Unless it is reversed, collective bargaining on a national scale stands immi-

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[23] More recently, Mr. Justice Black declared, "It would stretch credulity too far to say that the Railway Labor Act, designed to protect . . . workers, was somehow violated by the union acting precisely in accordance with that Act's purpose to obtain stability and permanence in employment for workers." The *Order of Rr. Telegraphers* v. *Chicago, etc. R. Co.*, 362 U.S. 330, 339-40.

nently threatened. Every industry-wide collective bargaining agreement, every labor union and every employer signatory to a multi-employer agreement is rendered a suspect for charges of violating *Sherman* by one or more disgruntled marginal employers seeking to operate at wage levels lower than those achieved in industry-wide bargaining.

To let the decision stand is to invite chaos in the existing pattern of multi-employer national bargaining agreements attained only after a long, bitter and expensive experience and currently prevalent in all major industries in this country. If the Sixth Circuit's doctrinaire is permitted to stand, the public interest will be thwarted because no labor union could hereafter safely expose itself to criminal, injunctive and monetary penalties imposed upon it by the Sixth Circuit's pattern in discharging the very duties and functions constituting the purpose of its existence and as directed by government itself.

This Court's recognition in *NLRB* v. *Truck Drivers Local Union*, 353 U.S. 87, 95-6, of Congress' intent that unions and employers in collective bargaining procedures may act in concert to equalize wages and that "Approximately four million employees are now governed by collective bargaining agreements signed by unions with thousands of employer associations" accentuates the need for review of the Sixth Circuit's judgment and opinion by issuance of the writ sought herein.

II. THE SIXTH CIRCUIT'S DECISION REPRESENTS AN INCORRECT CONSTRUCTION AND INTERPRETATION OF A PRIOR IMPORTANT DECISION OF THIS COURT CONSTRUING THE SHERMAN ACT. IT CONFLICTS TOO WITH A DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS.

The Sixth Circuit's holding (A. 20-1a) "it was a reasonable deduction which the jury could make that the wage determination for the coal industry under the Walsh-Healy Act . . . materially and adversely affected the operations of Phillips in the important TVA market, thus contributing to the elimination of the company as a competitor to the large coal producing companies operating in that area", and its use in sustaining the jury verdict conflict with this Court's prior construction and interpretation of *Sherman* in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and the District of Columbia Court of Appeals' decision in *Assn. of Western Railways* v. *Riss & Co., Inc.*, D.C. Cir., 299 F. 2d 133 (1962).

A material part of Phillips' theory, discussed at length by the Sixth Circuit (A. 20-23a), relates to Phillips' partial exclusion from the TVA market by reason of the Walsh-Healey Act which requires government contractors on contracts of $10,000 or more to pay "prevailing minimum wages" and empowers the Secretary of Labor to make that wage determination. Efforts of UMW and operators relating to the TVA and the minimum wage determinations are discussed *ante*, (pp. 21-23) Phillips' wages were well below *Walsh-Healey's* requirements, and it was thus foreclosed from the TVA markets on contracts of $10,000 or more.

Walsh-Healey's purpose "is to use the leverage of the government's immense purchasing power to raise labor standards." *Endicott Johnson Corporation* v.

Perkins, 317 U.S. 501; *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113. Yet the Sixth Circuit's opinion holds that campaigns and actions directed by a union and employers toward obtaining government action may be treated as illegal and serve as a basis for the imposition of judgments for *Sherman* violations. This is precisely what this Court rejected in *Noerr*, saying (365 U.S. 135) that no *Sherman* violation "can be predicated upon mere attempts to influence the passage or enforcement of laws", and that "the right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws *cannot properly be made to depend upon their intent in doing so*" (p. 139).

As in *Noerr*, the issue here is whether the joint efforts of UMW and certain coal operators to bring about governmental action is proscribed by *Sherman*. The district court reasoned that it was so regulated *where its purpose was to effect a trade restraint* (456-57a). The Sixth Circuit held that such joint action was lawful *only where "unaccompanied by a purpose or intent to further a conspiracy to violate a statute."* But this Court's *Noerr* rejects this view by declaring "that, at least insofar as the railroads' campaign was directed toward obtaining governmental action, *its legality was not at all affected by any anticompetitive purpose* it may have had" (365 U.S. 139-40), and that *"where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out"* (p. 136).

Though in *Noerr* the "sole purpose" of the railroads *"in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors"*

(365 U.S. 138), the Sixth Circuit would have the issue here turn on whether it was UMW's purpose "to drive small coal operators out of business".

Nor is the Sixth Circuit's decision herein reconcilable with the District of Columbia Court of Appeals' *Riss* case, which, implementing *Noerr*, declared that "joint solicitation of government action with respect to the passage or enforcement of laws does not violate the Sherman Act, *even if its purpose is to destroy competition*" (299 F. 2d 135).

III. THE SIXTH CIRCUIT'S SANCTION OF THE ADMISSION OF EVIDENCE AND THE JURY CHARGE RELATING TO UMW'S EFFORTS TO OBTAIN WALSH-HEALEY DETERMINATIONS AND TO HAVE TVA COMPLY THEREWITH IS IN CONFLICT WITH THIS COURT'S NOERR AND THE DISTRICT OF COLUMBIA CIRCUIT'S RISS CASES.

In both the trial court and the Sixth Circuit UMW urged not only that UMW's efforts to obtain a Walsh-Healey minimum wage determination and to have TVA comply therewith was lawful activity and did not constitute evidence of a conspiracy unlawful under *Sherman* but that there was reversible error in its admission. Similarly it pressed upon both courts that the district court's instruction, charging the jury that such joint activity was not violative of *Sherman unless* the jury found it was a part of a conspiracy to drive small operators out of business (1558a, 1587a), conflicted with *Noerr;* and consonant with that position UMW offered, but the trial court rejected, UMW's request No. 53 which omitted the "unless" portion of the court's instruction (1582a).[24] The Sixth Circuit rejected UMW's contentions and sanctioned both the

[24] In the Sixth Circuit, in addition to *Noerr*, UMW relied also upon *Riss* (299 F. 2d 133).

admission of the evidence and the trial court's jury instruction (A. 19-20a, 23-24a). The discussion under Reason II showing that *Noerr* rejects the subject evidence as having probative worth in establishing a conspiracy is equally apposite to these rulings of approval by the Sixth Circuit.

The Court will recall that the jury finding of conspiracy was a general one wherein the jury verdict did not explain which of the factors admitted in evidence it believed supported the verdict. Since the trial court erred under *Noerr* in the admission of evidence and in charging the jury, and because the jury verdict may have rested upon this erroneous theory, "it is unnecessary . . . to explore the legality of the other theories". *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, wherein (pp. 29-30) approval is given to the rule of *Maryland use of Markley* v. *Baldwin*, 112 U.S. 490, 493, as pertains to a general verdict: "Its generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld . . ." (370 U.S. 30).

IV. THE SIXTH CIRCUIT'S SANCTION OF THE ADMISSION OF EVIDENCE PLACING THE SECRETARY OF LABOR IN THE ROLE OF A CO-CONSPIRATOR OFFENDS THE RULE THAT THE SHERMAN ACT IS NOT APPLICABLE TO AUTHORIZED ACTIONS OF PUBLIC OFFICERS.

Under Reason II it has been shown that *Noerr* and *Riss* reject evidence of UMW's efforts in obtaining Walsh-Healey minimum wage determinations and TVA's enforcement of them. This evidence included the convention statement of Secretary of Labor Mitchell concerning these determinations and their

enforcement in connection with TVA's coal purchases.

The Sixth Circuit sanctioned the trial court's admission of Mitchell's convention speech, and its use by the jury as a "reasonable deduction" that the wage determination under *Walsh-Healey* contributed to Phillips' elimination as a competitor in TVA's spot market purchases (A. 20-1a). In so doing, the Sixth Circuit violated the rule enunciated by this and other federal courts that actions of public officials pursuant to and under authority of law do not fall within the trade restraints interdicted by *Sherman*. *Parker* v. *Brown*, 317 U.S. 341, 350; *Stroud* v. *Benson*, DC, E.D. North Carolina, 1957, 155 F. Supp. 482, vacated on other grounds, 4 Cir. 254 F. 2d 448, cert. den. 358 U.S. 817; *Miley* v. *John Hancock Mut. L. Ins. Co.*, DC, Mass., 1957, 148 F. Supp. 299, aff'd. 1 Cir., 242 F. 2d 758, cert. den. 355 U.S. 828.

V. THE NEED FOR THIS COURT'S GUIDANCE IN PENDING CASES INVOLVING SIMILAR CLAIMS IN EXCESS OF 37 MILLION DOLLARS EMPHASIZES THE IMPORTANCE OF THE WRIT'S ISSUANCE HEREIN.

Exclusive of the instant case, there are currently pending in federal district courts of Tennessee and Kentucky thirteen cases wherein coal producers seek damages against UMW in an amount exceeding $37,000,000 which are grounded in complaints either similar to or identical with that in Phillips' cross-claim herein against UMW and all involving the same issue of charged conspiracy under *Sherman*. It can be expected that, because the district courts of Tennessee and of Kentucky are within the Sixth Circuit's jurisdiction, the trial courts will deem it compulsory to use the Sixth Circuit's opinion in the instant case as a guide. In addition, two cases, one pending in Alabama (Fifth

Circuit) and another in Illinois (Seventh Circuit), amount to $1,350,000.[25]

Heretofore certiorari has been awarded "because determination of the issue raised here will guide adjustment of a large body of similar claims now pending" (*Alcoa S. S. Co., Inc.* v. *U. S.*, 338 U.S. 421, 423), or because "the incidence of the problem involved in this case is extensive and the treatment it has received calls for clarification" (*Local 761, Int. Union, etc. Workers* v. *NLRB*, 366 U.S. 667, 671), or because of the "importance of the principal question" (*U.S.* v. *Standard Oil Co.*, 332 U.S. 301, 302).

[25] The pending cases are as follows:

Name of Company	Amount Claimed
Tennco, Inc.	$ 1,200,000.00
Stansberry Coal Co.	300,000.00
Arnold Coal Co., Inc.	450,000.00
E. C. McPherson, t/a McPherson Coal Co., et al	300,000.00
Dean Coal Co.	750,000.00
George Ramsey, et al, d/b/a Walden Ridge Coal Co.	15,150,000.00
Tennessee Consolidated Coal Co. & Grundy Mining Co.	10,050,000.00
Tennessee Products & Chemical Corp.	4,500,000.00
Whitwell Coal Corporation	1,500,000.00
Chavies Mining Co., Inc.	1,425,000.00
Oscar Kelly d/b/a K & K Coal Co.	140,000.00
Ritchie Coal Co.	1,111,172.00
Coy Watts d/b/a Watts Coal Co.	166,500.00
Butler Coal Co., Inc.	600,000.00
Big Three Coal Co., Inc.	750,000.00
Total	$38,392,672.00

A detailed description of the foregoing cases is to be found in Appendix D, hereto (A. 66a).

The need for this Court's guidance in these cases should impel issuance of the writ.

CONCLUSION

For the reasons assigned, Petitioner prays that the Petition for Writ of Certiorari should be granted and that the writ issue to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit, entered in Case No. 14,809 on December 18, 1963.

Respectfully submitted,

HARRISON COMBS
900 Fifteenth Street, N. W.
Washington, D. C.

E. H. RAYSON
R. R. KRAMER
904 Burwell Building
Knoxville, Tennessee

M. E. BOIARSKY
511 Kanawha Valley Building
Charleston, West Virginia

Attorneys for Petitioner.

March 17, 1964

APPENDIX

APPENDIX A

Filed December 18, 1963

Nos. 14809-10

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14809

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admrx. of the Estate of BURSE PHILLIPS, deceased, *Cross-Plaintiffs-Appellees,*

v.

UNITED MINE WORKERS OF AMERICA, *Cross-Defendant-Appellant.*

No. 14810

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of the UNITED MINE WORKERS OF AMERICA WELFARE and RETIREMENT FUND, *Plaintiffs-Appellees,*

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admrx. of the Estate of BURSE PHILLIPS, deseased, *Defendants-Appellants.*

Appeals from the United States District Court for the Eastern District of Tennessee, Northern Division

Decided December 18, 1963.

Before: CECIL, Chief Judge, MILLER, Circuit Judge, and FREEMAN, District Judge.

MILLER, Circuit Judge. This is an action by John L. Lewis, Henry G. Schmidt and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund, hereinafter referred to as Trustees,

against the defendants, James M. Pennington, Raymond E. Phillips, and Burse Phillips, individually and trading as Phillips Brothers Coal Company, a partnership, hereinafter referred to as Phillips. The Trustees seek to recover $55,982.62 as royalty payments alleged to be due and unpaid pursuant to the terms of a trust provision contained in a wage agreement between United Mine Workers of America, hereinafter referred to as UMW or the Union, and Phillips. Following the death of the defendant Burse Phillips, Lillian Goad Phillips, Administratrix of his estate, was substituted as a party defendant.

The complaint alleges that on or about October 1, 1953, Phillips and the Union entered into the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, hereinafter referred to as the Wage Agreement, and at specified dates thereafter entered into said Wage Agreement, as amended September 1, 1955, and as amended October 1, 1956, and that pursuant to the terms of said Wage Agreement, as amended, Phillips was required to pay into the Welfare Fund the sum of 40 cents per ton on each ton of coal produced for use or sale. The parties have stipulated the amount of tonnage of coal so produced during the period of October 1, 1953, through December 31, 1958, which was subject to the 40 cents per ton royalty, that Phillips made royalty payments thereon pursuant to the Wage Agreements in the total amount of $2,227.70, and that the amount of royalty which was not paid on said total production was $55,982.62, being the amount sued for.

There is no contention by the defendants that the Wage Agreements were not executed by the partnership, but it is contended by them that they were invalid and that no liability exists for the unpaid royalties.

The answer alleges that the agreements were entered into by Phillips by reason of duress on the part of UMW, which conducted a program of terrorism in the section in

which Phillips' mine was located, with the result that the agreements were unwillingly executed because Phillips knew that they would not be permitted to operate their coal mine unless said agreements were signed.

The answer further alleges that UMW and certain large producers of coal entered into a conspiracy, the purpose of which was to place financial burdens upon Phillips and other small operators similarly situated that could not possibly be paid out of funds realized from the operation of the mine, and such mines, thus being unable to meet the demands, would be closed down, either through violence or suits such as the present one, leaving the business of shipping coal in interstate commerce and to the government agencies to the large coal operators; that UMW and the large coal companies conspired to increase such financial burdens by increasing the wage scale, both by modifications of the Wage Agreement and by having the Walsh-Healey Act apply to the coal industry and have the minimum wage determined thereunder; and that such conspiracy and the acts thereunder were in violation of Sections 1 and 2 of the Sherman Anti-Trust Act, Sections 1 and 2, Title 15, United States Code.

Section 1 of the Sherman Act provides in part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal; . . ."

Section 2 of the Act provides in part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine. . . ."

This same alleged conspiracy is the basis of a cross claim against UMW, in which the large coal producing companies were not made cross defendants, which also alleged that during the time the Wage Agreements were in effect and for the purpose of fulfilling the conspiracy, UMW forcibly closed down Phillips' mining operation and forcibly kept the mine closed over a period of time, which was accomplished by the presence of armed mobs comprised of members or agents of UMW, which intermittently marched through the countryside, closing numerous mines on their forays and creating a reign of terror.

The cross claim alleges that by reason of the conspiracy and the enforced closing down of the mine, Phillips was damaged in the amount of $100,000.00, which should be tripled under the provisions of Section 4 of the Clayton Act, Section 15, Title 15, United States Code.

By an amended answer and cross claim Phillips alleges that in contrast to the disputes which existed between the large coal-producing companies of the country and UMW during the period of World War II and the postwar period, there has been no dispute of any consequence between these parties since 1950, that the alleged conspiracy commenced in 1950, and that it has been implemented by additional understandings between the parties to make more effective the activities in restraint of trade. It specifically alleges that the Union agreed to the termination of employment for thousands of its members because of the mechanization of mines, that it would not protest the closing down of mines which could not be mechanized and that it would go along with the understanding that the coal industry would be confined to a comparatively few companies and the miners employed would be reduced drastically; that as a consequence of this understanding, membership of the United Mine Workers has decreased from 500,000 to 150,000; that the Union agreed that it would not make special agreements with the small operators in the Ken-

tucky and Tennessee region, which would give consideration to local conditions and the particular coal seams mined by the operators, but would have a standard agreement for all operators; that the Union agreed that in the planned mechanization program it would aid in the financing which would become necessary to attain the mechanization of the mines of the large companies; that the large coal-producing companies agreed with the Union that they would not protest the demands of the Union with respect to wage increases so long as the companies were able to match those increases by increased productivity through mechanization; that the companies agreed that there would be no protests from them over the Union's use of the Welfare Fund for its own purposes and in furtherance of its organizing efforts; that under the 1958 Wage Agreement it was required that all signatory operators refrain from buying or marketing nonunion coal; and that the Union and the large companies agreed that they would do all things possible to restrain the production, marketing and sale of nonunion coal.

By another amended cross claim Phillips claims damages for the period commencing four years prior to the filing of the original cross claim on February 14, 1958, the period of damage to end December 31, 1958, at which time the cross plaintiffs ceased to do business, as limited by the four-year limitation provided by Section 15b, Title 15, United States Code.

UMW moved to dismiss the cross claim on the ground that it stated no cause of action, that in so far as it alleged an unfair labor practice on the part of the Union under the provisions of Section 158(b), Title 29, United States Code, exclusive jurisdiction thereof was vested in the National Labor Relations Board, and that it stated no cause of action under the Sherman Anti-Trust Act or under Section 301 of the Taft-Hartley Act, Section 185, Title 29, United States Code. The motion was overruled, except in

so far as it challenged the jurisdiction of the District Court over any alleged unfair labor practice under Section 158(b), Title 29, United States Code, which ground of the motion was upheld by the Court.

Thereafter, UMW filed its answer in which it denies that it joined in any conspiracy in restraint of trade or commerce in violation of the Sherman Act, or that it monopolized or attempted to monopolize or conspire with any other person or group of persons to monopolize any part of the trade or commerce among the several states. Affirmatively, it alleges that by virtue of Section 6 of the Clayton Act, Section 17, Title 15, United States Code, it is exempt from the provisions of Sections 1 and 2 of the Sherman Act. It contends that it is a labor organization within the meaning of Section 6 of the Clayton Act and it acted as such for its members in the negotiations for the execution of the Wage Agreements and that during the period of time involved herein its acts were motivated by legitimate labor goals and for the purpose of securing union standards of wages and better conditions of employment for its members, thus qualifying for the exemption provided by the Act.

The claim of the Trustees against Phillips and Phillips' cross claim against the Union were consolidated for trial by jury. Following a trial of some four and one-half weeks the case was submitted to the jury.

As an aid to the jury in reaching its verdict, the Court prepared two verdict forms for the jury to answer.

Form No. 1 contained one paragraph reading as follows:

> "Did the Trustees engage in a combination or conspiracy so as to unreasonably restrain trade or commerce among the several states as alleged by the original defendant, Phillips Brothers Coal Company."

The jury answered this question yes.

Form No. 2 contained three paragraphs. The first paragraph read as follows:

> "Did the cross defendant, UMW, engage in a combination or consipracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states outside and beyond the exemption created by the anti-trust statutes to a labor organization as alleged by cross plaintiffs, Phillips Brothers' Coal Company."

The jury answered this question yes. The jury was instructed that if its answer to this first question was no, the remaining two questions need not be answered, but that if its answer to this first question was yes, it should answer the remaining two questions.

The second question read as follows:

> "If your answer to question 1 is yes, was cross plaintiff, Phillips Brothers' Coal Company, damaged in its business or property as a direct and proximate result of the conspiracy."

The jury was instructed that if its answer to this second question was no, it need not answer question 3. The jury answered the second question yes.

The third question for the jury to answer read as follows:

> "We find in favor of cross plaintiff, Phillips Brother's Coal Company, and fix its damages in the amount of _____ dollars."

The jury in answering this question fixed the damages in the amount of $90,000.00.

At the close of the evidence for Phillips, the Trustees and the Union moved for directed verdicts in their favor,

which motions were overruled. At the close of all the evidence, the Trustees and the Union moved for judgments in their favor notwithstanding the verdict and, in the alternative, that the verdict be set aside and that a new trial be granted.

The District Judge ruled that there was no material or substantial evidence to support the finding of the jury that the Trustees of the Welfare Fund, as distinguished from the Union, engaged in a combination or conspiracy to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states and ordered that the verdict of the jury in so finding be set aside. However, in entering judgment for the Trustees, he reduced the amount of the recovery from $55,982.62 to $43,424.22, ruling that the Trustees were entitled to royalties only for the period from and after April 25, 1955, to and including December 31, 1958, in that the employees of Phillips were not members of the Union until April 25, 1955. The Trustees have not appealed from this judgment, which eliminated the earlier part of their claim. Phillips has appealed from the judgment against it, which is appeal No. 14810, being one of the two appeals being herein considered.

The District Judge overruled the motion of the Union for judgment notwithstanding the verdict and, in the alternative, for a new trial, and entered judgment for Phillips against the Union in the amount of $270,000.00, being three times the amount of damages awarded by the jury, and also included in the judgment the additional sum of $55,000.00 as a reasonable amount of attorneys' fees to be awarded and assessed in accordance with the applicable statutes, thus making a total award in the favor of Phillips in the amount of $325,000.00. The Union has taken an appeal from this judgment, which is No. 14809, being the other of the two appeals herein being considered. The two appeals have been heard together on a joint appendix.

We consider first appeal No. 14809 taken by UMW from the judgment against it in favor of Phillips.

The first question presented is whether a labor organization is exempt from the provisions of the anti-trust laws under Section 6 of the Clayton Act, Section 17, Title 15, United States Code. It provides as follows:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Although some question about this may have existed prior to 1945, the Supreme Court held in that year that although an exemption exists in cases where a labor union acts alone in furtherance of its own purposes, it does not exist in cases where a labor union combines with a nonlabor organization to restrain competition in, or to monopolize the marketing of, goods in interstate commerce. *Allen Bradley Co.* v. *Local Union No. 3, etc.*, 325 U.S. 797. See also: *United Brotherhood of Carpenters, etc.* v. *United States*, 330 U.S. 395, 400; *Los Angeles Meat & Provision Drivers Union* v. *United States*, 371 U.S. 94, 99-101. The District Judge was not in error in refusing to dismiss the cross claim or to direct a verdict for the Union on this ground, and in submitting to the jury under a proper instruction the question whether the Union acted alone in carrying out the legitimate objects of labor unions, or aided, cooperated, conspired or combined with business groups in order to accomplish purposes which the anti-trust laws prohibit.

There is evidence to the effect that UMW forcibly closed down Phillips' mine by the presence of armed mobs which intermittently marched through the countryside. Reference is made to recent decisions of this Court holding that under certain conditions damages caused by such illegal action are recoverable by the injured party. *United Mine Workers of America* v. *Meadow Creek Coal Co.*, 263 F (2) 52, C.A. 6th, cert. denied, 359 U.S. 1013; *United Mine Workers of America* v. *Osborne Mining Co.*, 279 F(2) 716, C.A. 6th, cert. denied, 364 U.S. 881; *Gilchrist* v. *United Mine Workers of America*, 290 F(2) 36, C.A. 6th cert. denied, 368 U.S. 875; *Flame Coal Co.* v. *United Mine Workers of America*, 303 F(2) 39, C.A. 6th, cert. denied, 371 U.S. 891. However, the Union is correct in its contention that these cases are not applicable to the present action against it. Those actions were not brought under the anti-trust laws. Although a cause of action may exist for such damage under the common law or the Taft-Hartley Act, it does not follow that a cause of action also exists under Sections 1 and 2 of the Sherman Anti-Trust law where a combination or conspiracy in restraint of trade or an attempt to monopolize trade or commerce among the states must be shown. *Ace Beer Distributors, Inc.* v. *Kohn, Inc.*, 318 F(2) 283, 286 C.A. 6th. The District Judge correctly charged the jury on this issue in stating to it that the activities of labor unions, which are not violative of the Sherman Act, do not become violations of the Sherman Act even if such activities are carred out by violent means, and that acts of violence in and of themselves are not material to the determination of the question of whether the anti-trust laws were violated. However, it was not error for the jury to consider such evidence as bearing on the overall issue of whether such acts were done as part of a conspiracy to restrain competition or create a monopoly. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469; *Allen Bradley Co.* v. *Local Union No. 3, etc., supra*, 325 U.S. 797, 809-811.

It must also be kept in mind in considering this appeal that we are not concerned with any alleged violation of the Taft-Hartley Act, which, as the District Judge correctly held in ruling on the Union's motion to dismiss the cross claim, is a matter within the exclusive jurisdiction of the National Labor Relations Board. *San Di go Building Trades Council* v. *Garmon,* 359 U.S. 236. We think that the Union's rights were fully protected in this respect by the charge to the jury that the Taft-Hartley Act is not one of the anti-trust laws, that the jury was not concerned with awarding damages for any violation of the Taft-Hartley Act, that it must consider simply whether there had been a violation of the anti-trust laws, not the Taft-Hartley Act, causing damage to Phillips, and that even if there was a violation of the Taft-Hartley Act, it would not on that account be a violation of the anti-trust laws.

The Union's main contention on this appeal is that the evidence was insufficient to take the case to the jury on the allegations of the cross claim that it conspired with certain large coal producing companies to restrain trade in the bituminous coal industry among the several states or to monopolize the trade in such industry among the several states, and that it was error for the District Judge to overrule its motions for a directed verdict and for judgment notwithstanding the verdict.

The evidence in these cases is voluminous. It appears that many of the basic facts are not in dispute, although there is strong disagreement between the parties about the inferences or conclusions to be drawn from these facts. A review of the evidence in detail would unduly lengthen this opinion. We think it is sufficient to discuss some of the principal factual aspects of the case, which lead us to the conclusion that, although recognizing that some factual disputes may exist, yet taking that view of the evidence, with inferences reasonably and justifiably to be drawn

therefrom, most favorable to the prevailing party, there is substantial evidence in the record to justify the submission of this case to the jury and to support the verdict. *Battjes* v. *United States*, 172 F(2) 1, 5, C.A. 6th; *Local 175, etc.* v. *United States*, 219 F(2) 431, 433, C.A. 6th, cert. denied, 349 U.S. 917. On this appeal we do not judge the credibility of witnesses or weigh conflicting evidence.

The Union contends that not only was there no direct evidence that it conspired with large coal companies, or with anyone, for the purpose of putting any operator out of business, but that there is the unchallenged testimony of its President and its Secretary-Treasurer that it at no time joined with or agreed with any coal operator for such purpose. But it is recognized that conspiracies are seldom capable of proof by direct testimony and it is settled that they may be inferred from the acts of the parties thereto. Circumstantial evidence of the existence of a conspiracy may be sufficiently strong to raise a factual question for the jury even though there is no direct evidence that a conspiracy existed. It is the function of the jury to observe the witnesses while testifying, to appraise their credibility, to draw inferences from the facts established, to resolve conflicts in the evidence and to reach ultimate conclusions of fact. *Eastern States Retail Lumber Dealers, Ass'n.* v. *United States*, 234 U.S. 600, 612; *Local 175, etc.* v. *United States, supra*, 219 F(2) 431, 433, C.A. 6th, cert. denied, 349 U.S. 917; *Loew's Inc.* v. *Cinema Amusements*, 210 F(2) 86, 93 C.A. 10th, cert. denied, 347 U.S. 976.

In support of the basic theory of the cross claim that UMW and the major coal companies conspired to eliminate the smaller and weaker companies thus leaving the industry to the major coal companies alone, the following background was given to the jury. After World War II the economics of the Bituminous Coal Industry became unstable by reason of the fact that there was more coal being produced than the markets required; that before 1950 the

major coal producers and the union were in agreement that the major problem of the industry was over-production and that the growth of smaller independent and non-union producers was contributing to the problem; that the major companies and the Union disagreed on how the problem should be handled; that on its side the Union was contending that the answer was to cut down on the working time of the producers; that the Union urged a three-day work week; that for many months before the 1950 contract was signed the Union took the initiative on this question and directed the working time of the men in the industry; that this domination of the men in the industry was interfered with by the passage of the new Taft-Hartley Act; that the Union's efforts to maintain closed shops and to maintain a Union controlled welfare fund were challenged and in some instances were defeated in the Courts by the major coal companies; that the major coal companies were opposed to the Union's dictating the working time of the men in the industry because it cut into profits.

Phillips contends that a marked change occurred in the relations of the Union and the major coal companies in 1950 as disclosed in their bargaining relations before and after that year; that the understanding at the time of the signing of the 1950 Wage Agreement was that the major coal companies were to decide on the working time for their employees; that this was a surrender on the part of the Union of its previous policy of seeking to control the economics of the industry by controlling the working time; that the understanding was that the problem of stabilizing the economies of the industry was to be taken care of by eliminating the smaller and weaker companies, leaving the industry to the major coal companies alone.

The following history of the Wage Agreements between UMW and the coal operators show the increased financial burden placed upon the operators over the period of 1945 through 1958.

UMW and mine operators have negotiated collective bargaining agreements since UMW's beginning in 1890 until the present time. Failure of collective bargaining purposes to function led to work stoppages and seizures and operations of the mines by the Federal Government on five occasions during 1943 through 1946. The National Bituminous Coal Wage Agreement of 1945 terminated pursuant to its terms on March 30, 1946. Collective bargaining between the Secretary of the Interior and UMW resulted in a contract increasing wages $1.85 per day, establishing a welfare and retirement fund of 5 cents per ton on all coal produced for use or for sale and continuing the nine-hour day with overtime for work in excess of seven hours per day and thirty-five hours per week.

Ensuing disputes thereafter resulted in UMW terminating the agreement, but negotiations were resumed and a new agreement was entered into effective July 1, 1947, which increased wages $1.20 a day, reduced the work day to eight hours and increased payments to the welfare fund to 10 cents per ton. Following the resignation of the Welfare Fund's neutral trustee and a disagreement of the remaining two trustees with respect to pension payments, the UMW announced that the operators had dishonored the contract and a nationwide strike began in March 1948. The President invoked Taft-Hartley's national emergency provisions, a Board of Inquiry held hearings and injunction proceedings to enjoin the strike were instituted.

A new agreement was executed on June 25, 1948, which provided for an increase of $1,00 per day in wages and raised the royalty payment to the welfare fund to 20 cents per ton.

Under the 1950 agreement, executed on March 5, 1950, wages were increased 70 cents a day, and Welfare Fund royalties were increase from 20 cents to 30 cents a ton.

The 1951 agreement effective February 1, 1951, which amended the 1950 agreement, raised wages $1.60 a day to $16.35.

The 1952 agreement, effective October 1, 1952, raised basic daily wages $1.90 to $18.25, and increased fund payments from 30 cents to 40 cents a ton.

The 1955 agreement, effective September 1, 1955, raised wages in two steps for a total of $2.00 per day to $20.25, the vacation period was lengthened two days and vacation pay increased to $40.00.

The 1956 agreement, signed October 4, 1956, provided a $2.00 a day wage increase to $22.25 on a two-step basis. Vacation pay was raised $40.00 and for 1956 only a Christmas vacation period of three days with a $40.00 payment was provided.

The 1958 agreement, effective December 1, 1958, provided a two-step $2.00 a day wage increase, which brought basic wages as of April 1, 1959, to $24.25 daily. Vacation pay was raised $20.00 to a total of $200.00 for a fourteen-day period.

The campaign to impose the wage contracts upon the smaller nonunion mines was intense after 1950. In areas of strong resistance mobs and terrorism were used. One or more of the major coal companies assisted in closing the operations of the principal union competitor of UMW in the bituminous coal labor field. We think the evidence supports the contention of Phillips that the Union knew that the weaker companies could not meet the increased costs of wages and welfare fund payments required by the successive wage agreements and that they would fall by the wayside by reason thereof, and that the increased costs in the successive agreements were geared to the abilities of the major coal companies to mechanize and not have their profits affected by the increased costs.

There was also evidence that before signing the Wage Agreement in October 1953 Phillips told the UMW representative that it was a new company just starting out and that it could not pay the wage scale or the 40 cents a ton

to the Welfare Fund, and that the representative told them that they could work out their own working arrangements with their employees and pay whatever they could to the Welfare Fund. To its knowledge, no employee of the partnership belonged to the Union at that time and the Union did not represent the employees, although the Union succeeded in organizing the company later.

With respect to suits against coal operators in Tennessee for unpaid royalties, two suits were filed in 1954, no suits were filed in 1955, one suit was filed in 1956, no suits were filed in 1957, thirty-nine suits were filed in 1958, thirty-eight of which were pending as of December 1, 1960, when the tabulation was made, and seven suits were filed in 1959. It was the established policy of the Trustees to make no discounts or reductions or settlements for less than the full amount owed, irrespective of the economic condition of the operator. Many of the small operators were unable to meet the increased labor costs under the Wage Agreement and the payments to the Welfare Fund, and discontinued operations. Phillips strongly stresses the heavy increase in the litigation in 1958. The present action was filed against it on January 6, 1958.

The 1952 Wage Agreement contained a so-called "land-lease" provision, under which the signatory operators agreed that the Wage Agreement covered the operation of all of the coal mines owned or held under lease by them or by any subsidiary or affiliate, or acquired during the term of the agreement. The evidence showed that there was a large reserve of coal lands owned or held under lease by the major coal companies. It is argued that this provision barred the small coal companies that could not pay the union wage and the royalties to the Welfare Fund from operating this land and that there was but little good coal land available to them as a result of this provision.

The 1952 Wage Agreement contained a clause which provided that the signatory operators would not buy, sell or deal in coal mined by companies that did not pay the

same labor costs as contained in the Wage Agreement. The major coal companies had the practice of frequently buying coal from the smaller companies to apply on their large long-term contracts. This market was eliminated for those small companies that could not operate under the provisions of the Wage Agreement.

There was evidence showing that UMW acquired outright 85,400 shares, out of 857,264 shares outstanding, of the common stock, and the entire 50,000 shares of the preferred stock of West Kentucky Coal Company, one of the major coal companies, of which the Nashville Coal Company was a subsidiary. The common stock was acquired at a price of about $25.00 per share. Later, the stock market quotation rose to about $40.00 a share and thereafter declined to about $11.00 per share. The preferred stock was acquired at about $50.00 per share. The preferred stock became voting stock when dividends were in arrears. Arrearage dates back to April 1, 1958. On June 30, 1960, it was $309,375.00. In addition to the stock owned outright, UMW held substantial blocks of the stock of the two companies as collateral on loans. Under the provisions of many of these notes, which the collateral secured, the borrower was relieved from personal liability upon surrender of the collateral. The notes were renewed annually. If the interest was not paid, usually because dividends were not paid on the stock held as collateral, it was added to the principal of the renewal note. If the stock held as collateral declined in value, there was no demand for additional collateral. One of these loans in the amount of $2,513,895.18, secured by 90,600 shares of common stock of West Kentucky Coal Company, was to Cyrus S. Eaton, Chairman of the Board of West Kentucky Coal Company and Nashville Coal Company, as well as Chairman of the Board of Chesapeake & Ohio Railway Company, Steep Rock Iron Mines, Portsmouth Corporation, and a member of the Board of Cleveland Cliffs Iron Company, Cleveland Electric Illuminating Company, Kansas City Power & Light Company, and Sherwin Williams Company. This direct and in-

direct interest in the two coal companies totaled over $25,000,000.00. The shares of common stock of West Kentucky Coal Company owned outright and held as collateral totaled more than one-half of the outstanding common stock. It was not unreasonable for the jury to conclude from these facts that it was the purpose of the UMW to have a very material voice, if not the dominant one, in determining the policies and operations of these two major coal companies, which, as is hereinafter pointed out are charged with playing an important role in the alleged conspiracy. The evidence showed the large growth of the Tennessee Valley Authority steam plants, generating electricity by steam. The use of coal by TVA increased from 500,000 tons in 1950 to approximately 20,000,000 tons in 1956. The TVA plants were designed for the use of coal only. TVA buys coal under term and spot market bids. The spot market involves small orders of coal to be delivered in a short period of time, which offers definite advantages to small companies with weak financial resources, which can thus avoid long-term commitments. About seventy-five percent of TVA coal is bought on term contracts and about twenty-five percent on spot contracts. In 1955 UMW and two of the large coal producing companies successfully sought a determination by the Secretary of Labor of a minimum wage in the coal industry under the Walsh-Healey Act. The minimum wage determined was materially higher, in most instances twice as high, than the minimum wage determined in any other industry under the Walsh-Healey Act. This minimum wage determination prevented Phillips from bidding on the TVA term market, although it left open to Phillips for the time being the TVA spot market.

We believe that the following evidence is relevant on this phase of the case. At the 1956 Convention of the Union, President John L. Lewis introduced Secretary of Labor Mitchell, who, in the course of his remarks, spoke as follows:

> "I have had occasion, as Mr. Lewis has indicated, to work with your organization in the Department of

> Labor on many fronts. . . . As you know, about a year ago the Secretary of Labor, for the first time in history, found a minimum wage in the coal industry which controlled the wages that were to be paid to workers who worked on government contracts. We purposely sought that determination in order to exclude from government bidding those nonunion mines which are a detriment to the industry. And I think by and large we have succeeded, except for certain areas of government purchasing which still have to be, shall I say, investigated. Twenty-five per cent, at the moment of the TVA purchases are made under contracts less than $10,000.00, which excepts such purchases from the determination of the Walsh-Healey Act. I have set in motion a study of the TVA purchasing policy to see if there is any evasion of the Walsh-Healey determination on the part of TVA. I don't know whether there is or not, but if there is, you can be sure that we will correct it: . . . I propose to continue this enforcement policy, because I believe it is in the interest not only of the worker but is in the interest of the fair employer to prevent the chiseling, nonunion employer from competing in the market place with fair employers who hire union labor."

President Lewis, responding at the end of the speech, said:

> "I am sure that the Chair voices the sentiments in the mind of every delegate in expressing our appreciation of the address of the distinguished Secretary of Labor. His personal assurance of his intention to fairly treat the men of the coal industry is bulwarked and borne out by his attitude in the entire period of three and a half years of his incumbency of that office."

Although this evidence was objected to by the Union, it was admitted by the District Judge with the cautionary

admonition that the Secretary of Labor couldn't say anything that would prejudice the rights of the UMW unless the UMW authorized him to say it, or unless the UMW approved what he said, or ratified what he said, or acquiesced in what he said. We are of the opinion that this evidence was not improperly received.

Contracts for less than $10,000.00 were not subject to the wage determination of the Walsh-Healey Act. Phillips sold coal on the TVA spot market under contracts for less than $10,000.00, thus avoiding the wage determination of the Walsh-Healey Act. About the end of 1956 the price of coal on the spot market began to decline, which continued through 1957 and 1958, finally reaching a very low figure in 1958. During 1956, 1957 and 1958 Pittsburg-Midway Coal Co., Peabody Coal Co., West Kentucky Coal Co. and Nashville Coal Co., four of the large coal producing companies, made large offerings of tonnage on the TVA spot market at generally declining prices, with a number of such bids being successful. There was evidence that West Kentucky coal was sold extensively in the middle western market, most of it up and down the Mississippi Valley, that the middle western utility market had held up well, but that the distress coal which was for sale by West Kentucky Coal Co. and Nashville Coal Co. was for the most part thrown into the TVA market rather than the other market. There was also evidence that West Kentucky Coal Co., Nashville Coal Co. and Peabody Coal Co. did not make an analysis of the profit on the coal sold to TVA, the President of Peabody Coal Co. stating that he was "afraid to look at some of them." There was also evidence that the heavy offerings of West Kentucky coal on the TVA spot market would have the effect of bearing down on the price heavily.

We believe it was a reasonable deduction which the jury could make that the wage determination for the coal industry under the Walsh-Healey Act and the dumping of West Kentucky coal on the TVA spot market materially

and adversely affected the operations of Phillips in the important TVA market, thus contributing to the elimination of the company as a competitor to the large coal producing companies operating in that area, including the West Kentucky Coal Company, in which the UMW had such a dominant interest.

On the question of damages, Phillips introduced evidence showing the total tonnage it shipped on the TVA steam market in 1956, 1957 and 1958, the average price Phillips received for this steam coal, and the national average for all kinds of coal for those years. This is shown by the following table:

Year	Phillips Shipments	Price Received	National Average
1956	14,128.70 tons	$3.92	$4.82
1957	19,717.67	3.20½	5.08
1958	25,603.03	3.13⅓	4.86

The difference between what Phillips would have received in each of these years if it had received the national average and the amount it actually received was $12,715.83 in 1956, $37,003.49 in 1957, and $44,207.90 in 1958, or a total of $93,927.22. The jury by its verdict awarded damages in the amount of $90,000.00.

The Union challenges the sufficiency of this evidence to sustain an award of damages on the ground that the national average price of all kinds of coal does not afford a valid base of comparison with Phillips TVA coal. In particular, it contends that Phillips was a strip mine coal operator and that the national average price of all coal is substantially above the national average price of strip mine coal; that the utility market is the lowest coal market in price and may not be compared, pricewise, with the average market for all coal; that the spot market was the lowest part of the low-price utility market and that Phillips sold its coal on this lower priced spot market rather than on the higher priced term market; and that Phillips sold

its premium (block and egg) coal separately from its utility coal well above the prices received for its utility coal, but did not include receipts for its premium coal in its average price which is compared with the national average price of all coals.

These factors, if unexplained or unaccounted for, could have the effect of reducing the amount of the difference between the national average of all coals and the average price which Phillips received on the TVA spot market for steam coal, but in the light of other factors involved and brought out by the evidence, as hereinafter pointed out, we do not think the comparison was so unfair as to reject its consideration by the jury in its entirety in determining what, if any, damage Phillips suffered by reason of the conspiracy, if it found such a conspiracy existed.

In this connection there was evidence that the quality of steam coal, rather than the fact that it was deep underground coal instead of strip mining coal, was the important factor in the price; that the national average for high volatile bituminous coal was 12,900 BTU per pound, that the average for Tennessee high volatile bituminous coal was 13,460 BTU per pound; that Campbell County, Tennessee, coal, in which county Phillips operated, had an average of 13,200 BTU; and that there was a guaranteed minimum of 13,215 BTU per pound in the Phillips coal offered on a dry basis.

There was also evidence that the market for steam coal was not restricted to the utilities but included industrial concerns and railroads, and that the higher priced coal sold at retail had fallen from 20 per cent of the total in 1940 to 8 per cent in 1958. Although the fact was a disputed one, there was evidence to the effect that the difference between the national average price for all bituminous coal and the price received by Phillips for steam coal was not materially affected by the fact that the national average price was for all bituminous coal, including so-called pre-

mium coal, and that the coal sold by Phillips on the TVA market did not include premium coal.

It is true that damages which are speculative cannot be recovered. But that does not mean that when damages have resulted from a wrongful act, they cannot be recovered because they are uncertain in amount or because the injured party cannot show with certainty the exact amount of damage incurred. It is enough if the evidence shows the extent of the damage as a matter of just and reasonable inference, although the result be only approximate. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555. We are of the opinion that the evidence in the present case brought the case within that rule. The District Judge instructed the jury at length upon the question of damages. In our opinion, the rights of the Union on the question of damages were fully protected.

UMW contends that the District Judge erred in admitting evidence with reference to the Walsh-Healey prevailing wage determination and having TVA comply therewith, and in charging the jury concerning UMW's efforts to obtain Walsh-Healey prevailing wage determinations and to have TVA enforce such wages. It relies upon *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127. It was held in that case that no violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of laws, and that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly.

With respect to the Walsh-Healey Act, the District Judge charged the jury:

> "Any approach to the Secretary of Labor, which was designed to raise the minimum wages to be paid by coal operators doing business with the TVA or other

governmental agencies, was not a violation of the antitrust laws. Therefore, you will not give any consideration whatever to this approach to or meeting with the Secretary of Labor, unless you find that the approach to the Secretary of Labor was a part of the conspiracy to get the prevailing wages establish (sic) in the coal industry so high as to drive the small operators out of business."

UMW contends that although the first part of this instruction was in accordance with the ruling in the *Noerr* case, it was error to qualify the instruction by the concluding words, "unless you find. . . ."

The District Judge also instructed the jury that it was no violation of the antitrust law for the Union or the coal operators to urge the TVA to abide by the spirit and letter of the Walsh-Healey Act or to modify its methods of buying coal, "unless the parties so urged the TVA to modify its policies in buying coal for the purpose of driving the small operators out of business." The qualifying words in this instruction are likewise complained of.

We do not consttue the *Noerr* ruling as creating an unlimited exemption to Sections 1 and 2 of the Sherman Anti-trust Act. We believe that the *Noerr* ruling had reference to conduct which in good faith looked to the enforcement of the law or a modification of an existing policy, unaccompanied by a purpose or intent to further a conspiracy to violate a statute. It is the illegal purpose or intent inherent in the conduct which vitiates the conduct which would otherwise be legal. We find no error in the two instructions complained of.

Complaint is also made of the admission in evidence by the District Judge of statements of George Love, an alleged co-conspirator, before a prima facie case of the alleged conspiracy was presented. In doing so, the District Judge told the jury, "before these statements are competent as evidence and binding upon any alleged co-conspirator, the

jury will have to find that there was a conspiracy and that such statements were made in furtherance of the conspiracy." We find no error in admitting the statements before presenting a prima facie case of the alleged conspiracy, provided that the admission in evidence is conditional upon such proof of the conspiracy being later introduced, as the jury was instructed in this case. The District Judge has a wide discretion in controlling the order of proof. *United States* v. *Minton*, 107 F(2) 834, 844, C.A. 2nd, cert. denied, 309 U.S. 664; *Flintkote Company* v. *Lysfjord*, 246 F(2) 368, 378, C.A. 9th, cert. denied, 355 U.S. 835. We find no merit in the contention that without the statements of Mr. Love, the evidence was insufficient to support the allegation that a conspiracy existed.

Accordingly, the judgment in case No. 14809 is affirmed.

CASE NO. 14810

In this case the jury found that the Trustees of the Welfare Fund engaged in a combination or conspiracy so as to unreasonably restrain trade or commerce among the several states. The District Judge was of the opinion that there was no substantial evidence to support the verdict, set aside the verdict, and entered judgment for the Trustees notwithstanding the verdict, although in a reduced amount from that asserted by the Trustees.

On this appeal Phillips contends that the verdict is supported by evidence from which it could reasonably be concluded that (1) the Trustees paid benefits only to members of UMW; (2) the Trustees required the beneficiaries of the trust to picket or perform other acts for the UMW in order to obtain or retain pension benefits, or acquiesced in the doing of these things by the beneficiaries; (3) the Trustees, as a punitive measure, brought legal actions to recover royalties on coal produced; (4) the Trustees held out to the men in the industry that the Fund was under union control; and (5) the Fund, in fact, was under the domination and control of the UMW.

In setting aside the verdict the District Judge expressed the opinion that the action of a majority of the Trustees was required to bind the Fund (see *Van Horn* v. *Lewis*, 79 F. Supp. 541, D.C.D.C.); that the action of John L. Lewis, President of UMW, alone, without authorization or consent of the majority of the Trustees, was not sufficient to show that the Trustees conspired with the large coal operators to drive a small operator out of business, and that there was no evidence to support the finding that Mr. Lewis, for himself and another of the Trustees, entered into the alleged conspiracy.

We are of the opinion that the District Judge was not in error in setting aside the verdict and entering judgment for the Trustees notwithstanding the verdict. We find no direct evidence that the Trustees participated in the alleged conspiracy, and the inferences which Phillips would have us draw are not justifiable or reasonable in the light of the strong and uncontradicted testimony of the Trustees themselves. We concur in the opinion of the District Judge in his analysis of the evidence on this aspect of the case, to which we refer.

Since the District Judge ruled that the evidence was not sufficient to sustain the verdict that the Trustees engaged in a conspiracy to unreasonably restrain interstate commerce in violation of the Sherman Act, it was not necessary for him to rule upon Phillips' contention that such a violation of the Sherman Act, if it had occurred, was a bar to the right of the Trustees to recover in this action. However, should it be that that ruling and our concurrence in it is not the correct one, we are nevertheless of the opinion that, contrary to the contentions of Phillips, the verdict of the jury was not a bar to the right of the Trustees to collect the royalty payments which had accrued under the contract on the coal already mined. *Kelly* v. *Kosuga*, 358 U.S. 516; *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 549; *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165.

Phillips also attacks the validity of the contract under which the Trustees are seeking a recovery on two other grounds. (1) It is contended that UMW had not performed the statutory requirements necessary to be performed before a valid union security clause could be inserted in the contract between it and Phillips, and since the contract contained such a union security clause, it rendered the contract invalid. (2) It is contended that since the evidence shows that the contract was forced upon Phillips through threats and violence and Phillips' employees were in like manner forced to join the Union in order to make it possible for Phillips to operate its mines, this constituted an unfair labor practice on the part of the Union under the Labor-Management Relations Act, Sections 157 and 158(b), Title 29, United States Code, which, in turn, rendered the contract void in its entirety.

We doubt that these issues are before us on this appeal. They were not submitted to the jury and no facts were found by the jury with respect thereto. On the contrary, the District Judge instructed the jury:

> "The sole question for you to decide in the suit of the Trustees is whether the plaintiff Trustees engaged in a combination or conspiracy so as to unreasonably restrain trade or to monopolize commerce among the several states as alleged by Phillips Brothers."

Twice thereafter in his charge, the District Judge repeated the substance of this instruction to the jury. Following the instructions and a consideration of the UMW's objections to the charge, counsel for Phillips stated to the Court:

> "If your Honor please, the defendants and cross-plaintiffs have no exceptions to the charge and no requests for additional charges."

Lively v. *Elkhorn Coal Co.*, 206 F(2) 396, 399, C.A. 6th. Nevertheless, we will briefly answer these two contentions.

The first contention is rejected on the authority of *N.L.R.B.* v. *Rockaway News Supply Co.*, 345 U.S. 71, and *Lewis* v. *Benedict Coal Corporation*, 361 U.S. 459, 468-470.

In support of the second contention, Phillips relies upon *International Ladies' Garment Workers' Union* v. *N.L.R.B.*, 366 U.S. 731. In that case the employer entered into a collective bargaining agreement with a union which represented only a minority of the employees. The Labor Board found that both the employer and the union were guilty of an unfair labor practice, ordered the employer to cease and desist from giving effect to the collective bargaining agreement, and directed the holding of a representation election. The Court of Appeals granted enforcement of the order. The Supreme Court affirmed. In doing so, it said:

> "On the facts shown, the agreement must fail in its entirety. It was obtained under the erroneous claim of majority representation."

We think that statement must be construed in the light of the circumstances under which it was made. The Court did not have before it the question of the validity of the contract in a common law action to enforce it. The issue which it was passing upon was whether the execution of the contract constituted an unfair labor practice, and, if so, what was the proper remedy. The remedy was to direct the parties to cease and desist from operating under it. Because of the unfair labor practices the agreement *failed* to be binding on the parties. The same might be true of the bargaining agreement in this case if this was a proceeding before the Labor Board involving an alleged unfair labor practice. But it is not that kind of a proceeding, over which the Labor Board has exclusive jurisdiction. *Portland Web Pressmen's Union* v. *Oregonian Publishing Co.*, 286 F(2) 4, C.A. 9th, cert. denied, 366 U.S. 912. Neither the District Court nor this Court has jurisdiction to find either of the parties to the bargaining agreement guilty of an unfair labor practice, and no such finding has been made. In the absence of such a proceeding and find-

ing, we are of the opinion that the ruling in *International Ladies' Garment Workers' Union* v. *N.L.R.B.*, supra, 366 U.S. 731, is not applicable.

In any event, with respect to the coal already mined and the rights accrued thereby, we are of the opinion that the Trustees' right to recover is not barred. *Lewis* v. *Benedict Coal Corporation*, supra, 361 U.S. 459; *Kelly* v. *Kosuga*, supra, 358 U.S. 516.

The judgment in case No. 14810 is affirmed.

Judgment

Filed Dec. 18, 1963

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

s/ SHACKELFORD MILLER, JR.
United States Circuit Judge.

CAUSE ARGUED AND SUBMITTED

October 20, 1962

Before: CECIL, Chief Judge, MILLER, Circuit Judge, and FREEMAN, District Judge.

This cause is argued by Harrison Combs and R. R. Kramer for United Mine Workers, cross-defendant-appellant, and by John A. Rowntree for James M. Pennington, et al, cross-plaintiffs-appellees, and is submitted to the Court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

CIVIL ACTION No. 3431

JOHN L. LEWIS and JOSEPHINE ROCHE, as TRUSTEES of the UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND.

HENRY G. SCHMIDT, Trustee (amended 8-11-58), *Plaintiffs,*

v.

JAMES M. PENNINGTON, RALPH E. PHILLIPS and *BRUCE PHILLIPS, Individually and trading as PHILLIPS BROTHERS COAL COMPANY, A Partnership,**

*LILLIAN GOAD PHILLIPS, Admrx, as defendant and cross plaintiff in the place and stead of Bruce Phillips (substituted 9-30-60), *Defendants,*

v.

UNITED MINE WORKERS OF AMERICA, *Cross Defendant.*

Entered August 2, 1961

Judgment

This case came on to be heard before the Honorable Robert L. Taylor, Judge, upon the verdict of the jury, the motion of the plaintiffs-trustees, John L. Lewis, et al, for judgment notwithstanding the verdict of the jury and in the alternative for a new trial, and also upon the motion of

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** The name of "Ralph E. Phillips" was corrected to "Raymond E. Phillips" on January 16, 1961.

the cross-defendant, United Mine Workers of America, for judgment notwithstanding the verdict of the jury and in the alternative for a new trial, together with the petition and supporting affidavits of cross-plaintiffs for the allowance of attorneys' fees, and upon the entire record in the case and the Court having fully considered thereof together with the briefs and arguments of counsel is of the opinion and doth hold and adjudge for reasons stated in a memo delivered from the Bench that there is no material or substantial evidence in this record to support the finding of the jury that the Trustees engaged in a combination or conspiracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states as alleged by the original defendants, James M. Pennington, Raymond E. Phillips, and Lillian Goad Phillips, Administratrix of the Estate of Burse Phillips, deceased, and the partnership known as Phillips Brothers Coal Company.

WHEREFORE IT IS ORDERED AND DECREED that the verdict of the jury in so finding be set aside and the Court doth award the plaintiffs-trustees judgment for a portion of the claim asserted herein by them, finding and holding that said Trustees are entitled to have and recover royalty upon the quantity of coal produced for use or sale by the defendants, James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Administratrix of the Estate of Burse Phillips, deceased, and the partnership Phillips Brothers Coal Company, only for the period from and after April 25, 1955 to and including December 31, 1958, or a total of 108,560.56 tons, at the rate of Forty Cents ($0.40) per ton, or the sum of Forty-three Thousand, Four Hundred Twenty-four and 22/100 ($43,424.22) Dollars.

The Court doth further hold and adjudge that the motion of the cross-defendant, United Mine Workers of America, for judgment notwithstanding the verdict of the jury and in the alternative for a new trial is not well made, and,

therefore, the same, and each and every ground of said motion as stated in both alternatives, is overruled.

WHEREFORE, IT IS ORDERED AND ADJUDGED that the cross-plaintiffs, James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Administratrix of the Estate of Burse Phillips, deceased, and the partnership Phillips Brothers Coal Company, have and recover of the cross-defendant, United Mine Workers of America, in accordance with the applicable statutes, the sum of Two Hundred Seventy Thousand ($270,000.00) Dollars, being three times the amount of damages awarded by the jury, and also that they have and recover the additional sum of Fifty-five Thousand ($55,000.00) Dollars which the Court finds to be a reasonable amount of attorneys' fees to be awarded and assessed in accordance with the applicable statutes, thus making a total award in favor of said cross-plaintiffs and against the cross-defendant, United Mine Workers of America, in the amount of Three Hundred Twenty-five Thousand Dollars ($325,000.00).

It is further ordered and adjudged pursuant to the previous order of the Court that the counterclaim filed in this case against said Trustees by the defendants and cross-plaintiffs be, and the same hereby is, dismissed.

It is also ordered and adjudged that the costs in this cause shall be taxed after the time for appeal expires or after the disposition of the cause on appeal.

It is further ordered that execution issue in favor of the plaintiffs-trustees, John L. Lewis, et al., against the defendants, James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Administratrix of the Estate of Burse Phillips, deceased, and Phillips Brothers Coal Company, for the said sum of Forty-Three Thousand, Four Hundred Twenty-four and 22/100 Dollars ($43,424.22), and that execution issue in favor of the cross-plaintiffs, James M. Pennington, Raymond E. Phillips, and Lillian Goad

Phillips, Administratrix of the Estate of Burse Phillips, deceased, and Phillips Brothers Coal Company, against the said cross-defendant, United Mine Workers of America, for the said sum of Three Hundred Twenty-five Thousand Dollars ($325,000.00).

Filed July 31, 1961

Opinion Rendered From the Bench

This case was tried to a jury and the Court and consumed approximately five weeks of trial time. The jury returned a verdict on May 19, 1961 in response to two verdict forms, the pertinent parts of which read as follows:

"1. Did the cross-defendant, U.M.W., engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states outside and beyond the exemption created by the anti-trust statutes to a labor organization as alleged by cross-plaintiff, Phillips Brothers Coal Company?"

The jury answered "yes".

"2. If your answer to Question 1 is Yes, was cross-plaintiff, Phillips Brothers Coal Company, damaged in its business or property as a direct and proximate result of the conspiracy?"

The jury answered "yes".

"3. We find in favor of cross-plaintiff, Phillips Brothers Coal Company, and fix its damages in the amount of $90,000.00."

The other verdict form is as follows:

"1. Did the Trustees engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize commerce among the several states, as alleged

by the original defendant, Phillips Brothers Coal Company?''

The jury answered ''yes''.

For convenience the International Union will be referred to as U.M.W.; James M. Pennington, et al, as Phillips Brothers; and Messrs. John L. Lewis, Henry G. Schmidt and Miss Josephine Roche as Trustees.

U.M.W. has moved the Court to set aside the verdict of the jury and render a judgment in its favor, and has urged in its support three separate grounds which, for practical purposes, raise the question of the sufficiency of the evidence to support the verdict of the jury.

U.M.W., in the alternative, has moved for a new trial and urged in its support 68 separate grounds. Several of the grounds set forth in the alternative motion are directed to the question of the sufficiency of the evidence.

The effect of the finding of the jury is that the U.M.W. conspired with large coal companies to stabilize prices in the coal industry around the year 1950 in violation of Sections 1 and 2 of the Sherman Anti-Trust Laws.

Some of the circumstances relied upon by Phillips Brothers to support their contention that the parties combined and conspired to fix the cost of production of coal so high that the small operators could not operate successfully are: That the large operators and the union agreed to make every effort to put all producers of coal under union contract with the U.M.W. That after 1950 wages were increased without waiting for the previous contract between the union and the operators to expire. That the increases were geared to meet the abilities of the major companies to pay. That the increases were forced on the small companies with knowledge that they could not pay them. That the large coal companies contested controversial provisions in the wage agreements prior to 1950, for example, those on

union security, welfare, days of work, labor costs, rates of pay, while the large operators subsequent to this period permitted the Union to write these provisions into the wage provision contracts without protest. That one purpose of the unlawful agreement between U.M.W. and the large coal operators was to drive Phillips Brothers and other small operators out of business.

It is claimed that the Union was given control of the Welfare Fund; that Union membership clauses in the contract which were legal prior to 1950 continued to be observed by U.M.W. and by the large coal operators; that the Union used its funds to finance some of the major companies; that it purchased stock in one or more coal companies and advanced large sums of money to Mr. Eaton to invest in the West Kentucky Coal Company and accepted stock in that company as a collateral security for such advancements; that the U.M.W. worked hand in hand with this company and other large companies to drive small operators out of business.

It is claimed that the Union and the large coal operators knew that the small operators could not pay the wages and royalties stipulated in the wage agreement of 1950 and amended from time to time during the material period involved in this lawsuit.

The question for decision by this Court is whether there is any evidence to support the verdict of the jury that U.M.W. combined with business groups to restrain trade and monopolize the coal industry in interstate commerce. The principle is so well-established as not to require citation of authority that it is a violation of the law for a union to combine with employer groups to suppress competition or to monopolize an interstate industry. *Allen Bradley Co.* v. *Local 3, Electrical Workers*, 325 U.S. 797 (a case which has been referred to often today in the course of argument); *Carpenters* v. *U. S.*, 330 U.S. 395.

There is some proof in the record that Union representatives and large coal operator representatives discussed stabilization of prices at one time or another during the critical periods referred to in the cross-claim.

In passing upon a motion of this character, the Court is required to follow certain rules, some of which will be mentioned.

First, a conspiracy may be inferred from things done by the alleged conspirators. *Loew's, Inc.* v. *Cinema Amusements, Inc.*, 210 F. 2d 86, 93.

The Supreme Court, in discussing the subject of conspiracy, has stated:

> "A conspiracy is to be viewed by the Court as a whole; the integral parts thereof are not to be weeded out and inquired into separately." *U. S.* v. *Patten*, 226 U.S. 525 (This case has also been referred to by counsel during the argument today.)

Second, it is the duty of the Court to take the view of the evidence most favorable to Phillips Brothers and to sustain the verdict if there is substantial evidence to support it. *Lavender* v. *Kurn*, 327 U.S. 645; *Magnolia Petroleum Co.* v. *Howard*, (C.A. 10), 193 F. 2d 269.

It is rare for a conspiracy to be established by direct evidence. *Eastern State Retail Lumber Dealers Assn.* v. *U.S.*, 234 U.S. 600.

Conspiracies are ordinarily proved by circumstances. *Loew's, Inc.* v. *Cinema Amusements, Inc.*, supra, 93.

Third, damages may not be recovered in a conspiracy case unless they are shown with reasonable certainty to have resulted from the wrongs of the conspirators but the injured party will not be deprived of damages because of uncertainty as to the amount. *Story Parchment Co.* v. *Patterson Paper Co.*, 282 U.S. 555.

Fourth: The question of the amount of damages is for the jury provided the injured party has established by the preponderance of the proof with reasonable certainty that he has sustained damages as a direct and proximate result of the wrongful acts of the alleged conspirators.

> "... raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150.

Fifth: It is not necessary to find specific intent to restrain trade or to build a monopoly in order to find that the antitrust laws have been violated. It is sufficient that a restraint of trade or monopoly results as a consequence of the wrongs of the alleged conspirators. *U. S.* v. *Patten, supra,* 543; *U. S.* v. *Masonite,* 316 U.S. 265, 275.

Our Sixth Circuit has stated that the trial judge does not sit as a 13th juror as does the trial judge in the state courts of Tennessee. In discussing this subject, the Court quoted from the case of *Tennant* v. *Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35, as follows:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Then follows the statement that,

> "It would be a usurpation of judicial authority, in the absence of any showing of bias, prejudice, passion, corruption or caprice upon the part of the jury where there is in the record substantial evidence to support the amount awarded by a jury as damages to the plaintiff, should the trial judge presume to set aside the verdict, or to reduce it, merely because the judge himself would not have awarded so large an amount had the

case been tried to him without a jury." *Werthan Bag Corp.* v. *Agnew*, 202 F. 2d 119. See *Spero-Nelson* v. *Brown*, (C.A. 6), 175 F. 2d 86.

Counsel for Phillips Brothers have reviewed the evidence in their briefs in detail and have undertaken to point out various parts of the evidence which they claim support their theory that a conspiracy was shown.

Counsel for U.M.W. have likewise reviewed the evidence in detail and have pointed out certain portions of the evidence which they claim sustain their contention that the evidence is insufficient to support the charge of conspiracy.

The Court has given careful consideration to these briefs. As stated at the outset of the hearing, the briefs cover some 366 pages. At this point the Court will digress from the main subject to state that although the jury verdict was returned on May 19, 1961, and the last brief was not filed until July 28, 1961, and the case was not set for argument until today, namely, July 31, 1961, the Court had a purpose in not pushing or prodding the attorneys in the early filing of their briefs. The Court granted numerous extensions of time in which to file the briefs. The purpose was to give counsel plenty of time to prepare thorough briefs, as the Court recognizes that the case presents complex issues of fact and of law.

As previously indicated, the briefs have been given careful consideration. We have heard extended oral arguments and from the record as a whole, the Court is of the opinion, and finds, that there is substantial evidence to support the verdict of the jury in the cross-claim against the U.M.W. and, therefore, overrules the motion of U.M.W. for a judgment nothwithstanding the verdict of the jury.

Only brief mention will be made of the U.M.W.'s motion for a new trial because what the Court has previously said is sufficient to dispose of a number of the grounds urged in support of the motion for a new trial.

The first six grounds of this motion again raise the question of the sufficiency of the evidence. Nothing further need be said concerning this question.

Grounds 7 through 61, inclusive, complain of the rulings of the Court on various questions of evidence. It is the opinion of the Court that it did not commit prejudicial error against the U.M.W. in its rulings on the objections to certain portions of the evidence. We do not believe that it is either proper or necessary at this time to take up separately the various rulings and repeat the reasons given by the Court for its action during the course of the trial. These rulings have been thoroughly discussed by the parties in their briefs and they were thoroughly discussed during the trial.

Ground No. 62 complains of the action of the Court in failing to submit to the jury U.M.W.'s Requests No. 37, 49, 50, 53, 53A, 58 and 63. The Court believes that it charged revised Request No. 53A verbatim. The court further believes that it gave Requests No. 50 and 53 as supplements to its original charge.

The other charges, Nos. 37 through 63, were charged in substance, except Request No. 58, and as to that request the Court was of the opinion, and is now of the opinion, that it would not have been proper to charge that request.

The Court is of the opinion that Ground No. 63 is without merit and is therefore overruled.

Ground No. 64 is general and does not require a discussion.

Grounds No. 65 and 66 also complain of certain portions of the charge. It is the opinion of the Court that these grounds are without merit and are, therefore, overruled.

Ground No. 67 asserts that the Court erred in permitting the consolidation for trial of the Trustee's action against Phillips Brothers with the cross-action of Phillips Brothers against U.M.W. It is claimed that U.M.W. was

improperly joined in the action under Rule 13(h) of the Federal Rules of Civil Procedure. That the original answer raised the defense of the contract being made pursuant to a conspiracy in violation of the anti-trust laws. That a counterclaim was filed against the Trustees and a cross-claim was filed against the U.M.W. That the Court granted the motion for an order under Rule 13(h) to bring the U.M.W. into the case as a cross-defendant. That service was bad upon U.M.W. and the Trustees moved to quash the service of process. That amendments and motions to amend the answer, the cross-claim and counterclaim were filed in which the conspiracy was described and set up as a defense to the original claim of the Trustees. That it was also the basis of the counterclaim against the Trustees and the basis of the cross-claim against the U.M.W. That under these circumstances the Court had no right to allow the case to be continued against U.M.W. after the claim for affirmative relief against the Trustees had been withdrawn. Rule 15(c) of the Federal Rules of Civil Procedure relates amendments back to the date of the original pleading. The motion to quash the service of process was denied.

It is the opinion of this Court that inasmuch as the cross-claim charged U.M.W. with being a co-conspirator in the same conspiracy raised as a matter of defense against the Trustees' claim, the Union was properly brought into the case under Rule 13(h). *Lesnik* v. *Public Industrials Corp.*, 144 F. 2d 968.

Where there is service of process and where federal jurisdiction is present, the Court may try the ancillary claim regardless of the disposition made of the original claim. *Pierce* v. *Perlite Aggregates*, 110 F. Supp. 684; *Switzer Bros., Inc.* v. *Chicago Card Board Co.*, 252 F. 2d 407. See *Emmerich* v. *May*, 130 F. Supp. 426; *U. S.* v. *Milhan*, 15 F.R.D. 459.

Rule 13 contemplates bringing in third parties where the subject matter raised is to qualify or defeat the original

claim of the plaintiff against the original defendant. The purpose of the rule is to avoid circuity of action and to dispose of the entire matter at one time. *Blair* v. *Cleveland Twist Drill Co.*, 197 F. 2d 842.

Rule 20(a) provides:

> "All persons may be joined in one action as defendants if there is asserted against them jointly, severally or in the alternative, any right to relief in respect thereof or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

Rule 21 provides:

> "Parties may be dropped or added by order of the Court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."

The purpose of these rules is to require that all disputes relating to the same subject matter be settled in one lawsuit.

As previously indicated, it is the contention of U.M.W. that the dismissal of the counterclaim brought about a dismissal of the cross-claim. This contention seems to run counter to Rule 20(a), which is as follows:

> "A plaintiff or defendant need not be interested in obtaining or defending against all of the relief demanded. Judgment may be given for one or more of the plaintiffs, according to their respective rights to relief and against one or more defendants according to their respective liabilities."

Rule 54(b) provides:

> "When more than one claim for relief is presented in an action, whether as a claim, or counterclaim, cross-claim, or third-party claim, the Court may direct the

entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated which adjudicates less than all of the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of the judgment adjudicating all of the claims."

Aside from the aforementioned rule, it is the opinion of the Court that it had the right to treat the cross-claim against the U.M.W. as an original suit. The question of conspiracy was involved in both of the suits. That is, the question was involved in the defense to the claim of the Trustees and it was involved in the claim of Phillips Brothers against U.M.W. It does not seem feasible to this Court to have a five weeks trial in the U.M.W. phase of the case and also a five weeks trial on the Trustees phase of the case when the matter of conspiracy could just as well have been settled in one trial.

Ground No. 68 asserts that there is no material evidence that U.M.W. conspired with each of the coal companies which are alleged to be co-conspirators, and the Court erred in failing to sustain U.M.W.'s motion for a partial directed verdict as to each of the alleged co-conspirators.

It is to be observed that it was not necessary for the proof to show that U.M.W. conspired with all of the coal companies named in the complaint in order for Phillips Brothers to establish a cause of action but only one or more of them. This ground of the motion, in the opinion of the Court, is also without merit.

Mention should be made at this time of the claim of U.M.W. that the Court erred in admitting evidence bearing

on the question of conspiracy before the damage period and subsequent to the damage period. Specific mention should be made of this question because of the repeated insistence of U.M.W. that the Court committed prejudicial error in admitting this character of testimony. The jury was told that such evidence was admitted for whatever bearing, if any, it had on the alleged conspiracy but that it was not admitted as bearing on the question of damages and the jury should not consider it on the question of damages.

It is the opinion of the Court that since a general conspiracy was charged such evidence was clearly competent as bearing on the question of whether a conspiracy existed during the crucial period. *Buckeye Powder Co.* v. *Hazard Powder Co.*, 205 F. 827, 830; *Hillside Amusement Co.* v. *Warner Bros Pictures*, 7 F.R.D. 260; *Wellman* v. *U. S.*, (C.A. 6), 227 F. 2d 757; *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683.

For the reasons indicated, the Court is of the opinion and holds that the motion of U.M.W. for a judgment notwithstanding the verdict of the jury and the alternative motion of U.M.W. for a new trial, and all of the grounds urged in support of these motions, are without merit and are therefore overruled.

This brings us to the Trustees' motion to set aside the verdict of the jury and to enter judgment in their favor for $55,982.62 with interest. The motion is based upon the proposition that the evidence is insufficient in law to sustain the verdict of the jury that the Trustees engaged in the conspiracy charged in the counterclaim.

The overt acts charged against the Trustees are:

(a) The Trustees paid benefits only to members of U.M.W.

(b) The Trustees required the beneficiaries of the trust to picket or perform other acts for the U.M.W. in order

to obtain or retain pension benefits, or acquiesced in the doing of these things by the beneficiaries.

(c) The Trustees, as a punitive measure, brought legal actions to recover royalties on coal produced.

(d) The Trustees held out to the men in the industry that the Fund was under Union control.

(e) The Fund, in fact, was under the domination and control of the U.M.W.

The Court charged the jury that these acts standing alone were not sufficient to establish that the Trustees were co-conspirators.

The Court further charged the jury that the acts of individuals, unless the Trustees actually authorized the unlawful acts, if any, or ratified such acts, if any, after actual knowledge thereof, would not bind the Trustees so as to make them parties to the alleged conspiracy.

The Court further charged that the Trustees, in their official capacity, had no legal right to require or not to require the beneficiaries of the Fund to picket on behalf of U.M.W. in labor matters; that the Trustees were legally obligated to collect all monies due the Fund and to use reasonable means to make such collection, including the bringing of suits; that the Fund "was created by a trust instrument contained in the National Bituminous Coal Wage Agreement of 1950 pursuant to Section 302 of the Taft-Hartley Act, and the wording of the trust agreement was in accordance with the requirements of the Taft-Hartley Act. The trust instrument provides for payment of benefits to employees of signatory operators. . ."

Action of a majority of the Trustees is required to bind the Fund. See *Van Horn* v. *Lewis*, 79 F. Supp. 541.

In the opinion of the Court there is no substantial evidence to support the verdict of the jury that a majority of the Trustees participated in the alleged conspiracy.

There is no evidence that either Miss Josephine Roche or Mr. Henry G. Schmidt or Mr. Charles A. Owen, now deceased, (those parties being the only parties, except Mr. John L. Lewis, who served the trust fund after 1950), had any dealings with large coal operators from which it could be inferred that they agreed, combined, or conspired to stabilize coal prices in the bituminous coal industry in interstate commerce.

The actions of Mr. Lewis alone without authorization or consent of a majority of the Trustees would not be sufficient, in the opinion of the Court, to bind the Fund or to show that the Trustees conspired with the large coal operators to drive a small operator out of business. If it had been shown that Mr. Lewis controlled the actions of the other Trustees at the time this alleged conspiracy was formed, this might present a different question.

In the opinion of the Court there is no evidence to support the verdict of the jury that Mr. Lewis, for himself and another of the Trustees, entered into the conspiracy so as to bind the Trustees either individually or in their capacity as trustees or to bind the Trust Fund.

The charge that the Trustees were conspirators seems to have been directed at Mr. Lewis. This can very well be understood inasmuch as Mr. Lewis served in a dual capacity. He was president of the U.M.W. during the material period and also chairman of the Fund during this period.

Counsel for Phillips Brothers pointed out in their brief that Mr. Lewis made certain statements in his testimony given on discovery to the effect that the U.M.W. and some of the large coal operators decided to stabilize prices, but some of his testimony during the trial was not entirely consistent with that testimony. If there is a sound basis for such contention, we do not believe that this is sufficient to sustain the verdict of the jury that the Trustees participated in the conspiracy.

The evidence is reasonably clear that Union membership was not a prerequisite for obtaining benefits from the Fund after 1950. In that connection, it must be recalled that in 1951 the Trustees published a brochure setting forth in detail the requirements of pension benefits, not one of which was Union membership. Trustees Roche, Schmidt and Lewis each testified that benefits from the Fund have been paid to non-Union members as well as to Union members. Such was also the testimony of counsel Mitch.

The evidence is insufficient to show that the Trustees instituted suits for the purpose of eliminating small operators. Trustees Roche and Schmidt testified that the matter of institution of suits was left in the hands of counsel Mitch for the most part.

The evidence is insufficient to show that the Trustees required pensioners to picket for the U.M.W. in order to obtain or retain benefits of the Fund.

The evidence is insufficient to show that the Trustees held out to industry empolyees that the Fund was under Union control. The Trustees testified positively that the Union did not dominate or control the Fund. The evidence is insufficient to show the contrary.

It is true that there are some suspicious circumstances in the record not only as to these matters but also as to other charges against the Trustees. However, a juror's verdict cannot be based upon suspicion alone. *N.L.R.B.* v. *Sun Shipbuilding & Dry D. Co.*, (C.A. 3), 135 F. 2d 15, 31.

Substantial evidence means more than merely the suspicion of the existence of a fact. *Hazel-Atlas Glass Co.* v. *N.L.R.B.*, (C.A. 4), 127 F. 2d 109, 117.

Having found that there is no substantial evidence to support the verdict of the jury that the Trustees engaged in the conspiracy as charged by Phillips Brothers, it follows as a matter of contract that the Trustees are entitled to

recover unpaid royalties due them under the contract signed by Phillips Brothers, but the Trustees are not entitled to recover the royalties that accrued before a majority of the employees of Phillips Brothers became members of the Union. At the time Phillips Brothers signed the National Bituminous Coal Wage Agreement of 1950, the U.M.W. did not represent a majority of their employees and therefore was not the bargaining agent for the employees. We think that a fair interpretation of the record shows that a majority of the employees of Phillips Brothers joined the Union on April 25, 1955. The Trustees, therefore, are entitled to recover unpaid royalties that accrued after that date. The Court bases this conclusion on the principles announced in the case of *International Ladies Garment Workers' Union, AFL-CIO* v. *N.L.R.B. and Bernhard-Altmann Texas Corporation*, U. S. Supreme Court, June 5, 1961.

In view of the foregoing conclusion, it is not necessary for the Court to determine the question of whether the Trustees would be deprived of recovery if there had been evidence to support the verdict of the jury that the Trustees joined in the conspiracy, as charged by Phillips Brothers.

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The record in this case shows that Mr. Jerome Taylor, associate of Mr. Templeton, performed ten hours of work; Mr. Harley G. Fowler, a partner of Mr. Rowntree, 200 hours; Mr. Templeton 370 hours; Mr. Robertson 1,189 hours, and Mr. Rowntree, 2,792 hours, making a total of 4,461 hours. A part of this work was necessarily performed in the defense of the claim of the Trustees against Phillips Brothers.

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APPENDIX C

15 USCA:

§ 1. TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL; EXCEPTION OF RESALE PRICE AGREEMENTS; PENALTY

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the

court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 2. Monopolizing Trade a Misdemeanor; Penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

§ 3. Trust in Territories or District of Columbia Illegal; Combination a Misdemeanor

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 3, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

§ 15. Suits By Persons Injured; Amount of Recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 17. Antitrust Laws Not Applicable to Labor Organizations.

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraints of trade, under the antitrust laws. Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.

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29 USCA Sec. 52 (Sec. 20 of the Clayton Act):

§ 52: Statutory Restriction of Injunctive Relief

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for

which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. Oct. 15, 1914, c. 323, § 20, 38 Stat. 738.

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29 USCA Sec. 102 (Sec. 2 of the Norris-LaGuardia Act):

§ 102: Public Policy in Labor Matters Declared

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners

of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. Mar. 23, 1932, c. 90, § 2, 47 Stat. 70.

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29 USCA Sec. 104 (Sec. 4 of the Norris-LaGuardia Act):

§ 104: Enumeration of Specific Acts Not Subject to Restraining Orders or Injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless

of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 4 Stat. 70.

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29 USCA Sec. 106 (Sec. 6 of the Norris-LaGuardia Act):

§ 106: RESPONSIBILITY OF OFFICERS AND MEMBERS OF ASSOCIATIONS OR THEIR ORGANIZATIONS FOR UNLAWFUL ACTS OF INDIVIDUAL OFFICERS, MEMBERS, AND AGENTS

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable

in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.

Labor Management Relations Act, 1947 (29 USCA):

§ 141: SHORT TITLE; CONGRESSIONAL DECLARATION OF PURPOSE AND POLICY

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. June 23, 1947, 3:17 p.m., E.D.T., c. 120, § 1, 61 Stat. 136.

§ 151: Findings and Declaration of Policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 136.

§ 157. Right of Employees as to Organization, Collective Bargaining, Etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 140.

§ 158. UNFAIR LABOR PRACTICES

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159 (f), (g), (h) of this title, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for

nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

* * * * *

July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601.

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization

or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

* * * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreeement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreeement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b) (4). (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception. As amended September 14, 1959; Pub. L. 86-257, Sec. 704(b).

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§ 185. Suits by and Against Labor Organizations—Venue, Amount, and Citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * * * *

(b) . . . Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. . . . June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title III, § 301, 61 Stat. 156.

* * * * *

§ 187. Boycotts and Other Unlawful Combinations; Right to Sue; Jurisdiction; Limitations; Damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title. As amended Sept. 14, 1959, Pub. L. 86-257, Title VII, § 704(e), 73 Stat. 545.

(b) Whoever shall be injured in his business or property by reason or[1] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title III, § 303, 61 Stat. 158.

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[1] So in original. Probably should read "of."

29 USCA (Fair Labor Standards Act of 1938):

§ 201. SHORT TITLE

This chapter may be cited as the "Fair Labor Standards Act of 1938". June 25, 1938, c. 676, § 1, 52 Stat. 1060.

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§ 202. CONGRESSIONAL FINDING AND DECLARATION OF POLICY

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interfers with the orderly and fair marketing of goods in commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power. June 25, 1938, c. 676, § 2, 52 Stat. 1060; Oct. 26, 1949, c. 736, § 2, 63 Stat. 910.

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41 USCA (Walsh-Healey Act):

§ 35. CONTRACTS FOR MATERIALS, ETC., EXCEEDING $10,000; REPRESENTATIONS AND STIPULATIONS

In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District

of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

* * * * *

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

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(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection. June 30, 1936, c. 881, § 1, 49 Stat. 2036; May 13, 1942, c. 306, 56 Stat. 277.

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§ 38. Same; Administration; Officers and Employees; Appointment; Investigations; Rules and Regulations

The Secretary of Labor is authorized and directed to administer the provisions of sections 35-45 of this title and to utilize such Federal officers and employees and, with the

consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of said sections and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, without regard to the provisions of the civil-service laws but subject to the Classification Act of 1949, an administrative officer, and such attorneys and experts, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of sections 35-45 of this title. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as provided in sections 35-45 of this title, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of sections 35-45 of this title. June 30, 1936, c. 881, § 4, 49 Stat. 2038; Oct. 28, 1949, c. 782, Title XI, § 1106 (a), 63 Stat. 972.

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§ 39. Same: Hearings by Secretary of Labor; Witness Fees; Failure to Obey Order; Punishment

Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of sections 35-45 of this title, and on complaint of a breach or violation of any representation or stipulation as provided in said sections, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory

or possession, or the United States District Court for the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of sections 35-45 of this title. June 30, 1936, c. 881, § 5, 49 Stat. 2038; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

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§ 45. Same; Effective Date; Exception as to Representations with Respect to Minimum Wages

Sections 35-45 of this title shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from June 30, 1936: *Provided, however,* That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor. June 30, 1936, c. 881, § 12, 49 Stat. 2039, renumbered June 30, 1952, 9:36 a.m., E. D. T. c. 530, Title III, § 301, 66 Stat. 308.

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APPENDIX D

Style	Civil Action No.	Court	Amount	Date Filed
*Tenneco, Inc. v. U.M.W.A., et al	3493	U.S.D.C. E.D. Tenn. Northern Division	$1,200,000.00	May 23, 1958
*Harry P. Stansberry, individually and T/A Stansberry Coal Co. v. U.M.W.A.	3432	U.S.D.C. E.D. Tenn. Northern Division	300,000.00	Jan. 1959
*Arnold Coal Co., Inc. v. U.M.W.A.	3446	U.S.D.C. E.D. Tenn. Northern Division	450,000.00	Jan. 3, 1961
*E. C. McPherson, et al v. U.M.W.A.	3591	U.S.D.C. E.D. Tenn. Northern Division	300,000.00	Nov. 30, 1961
Dean Coal Co., a corporation, organized under the laws of the State of Tennessee v. U.M.W.A.	4463	U.S.D.C. E.D. Tenn. Northern Division	750,000.00	May 21, 1962
George Ramsey, Elmer D. Studer, Walter H. Studer and Dale Studer, d/b/a Walden Ridge Coal Co., et al v. U.M.W.A., John L. Lewis, Henry Schmidt and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund, West Kentucky Coal Company, Inc., Cyrus W. Eaton, Tennessee Valley Authority, G. O. Wessenauer, Manager of Power for Tennessee Valley Authority and the Louisville and Nashville Railway Company, Inc.	3667	U.S.D.C. E.D. Tenn. Southern Division	15,150,000.00	Feb. 6, 1961
Tennessee Consolidated Coal Co. and Grundy Mining Co. v. U.M.W.A. and West Kentucky Coal Co.	4178	U.S.D.C. E.D. Tenn. Southern Division	10,050,000.00	Sept. 27, 1963

* Cases so marked were initially instituted against the Company indicated by Trustees of the UMWA Welfare & Retirement Fund and in each instance the Company then filed a cross-claim against UMW.

APPENDIX D (continued)

Style	Civil Action No.	Court	Amount	Date Filed
Tennessee Products & Chemical Corp. v. U.M.W.A. and West Kentucky Coal Co.	4189	U.S.D.C. E.D. Tenn. Southern Division	4,500,000.00	Oct. 17, 1963
*Whitwell Coal Corp. v. Lewis, et al., U.M.W.A., West Kentucky Coal Co. and L. & N. Railroad Co.	605	U.S.D.C. E.D. Tenn. Winchester Division	1,500,000.00	Aug. 4, 1962
Chavies Mining Co., Inc. v. U.M.W.A.	412	U.S.D.C. E.D. Ky. Jackson	1,425,000.00	Feb. 27, 1963
Oscar Kelly d/b/a K & K Coal Co. v. U.M.W.A.	413	U.S.D.C. E.D. Ky. Jackson	140,000.00	Feb. 27, 1963
M. W. Ritchie, Sr., Mark Cann, B. C. McClanahan and Henry C. Kelly, d/b/a Ritchie Coal Co. v. U.M.W.A.	414	U.S.D.C. E.D. Ky. Jackson	1,111,172.00	Feb. 27, 1963
Coy Watts, d/b/a Watts Coal Co. v. U.M.W.A.	415	U.S.D.C. E.D. Ky. Jackson	166,500.00	Feb. 27, 1963
Butler Coal Co., Inc. a corporation v. U.M.W.A.	CA63-125	U.S.D.C. N.D. Ala. Southern Division	600,000.00	Mar. 26, 1963
Big Three Coal Co. v. U.M.W.A.	5173	U.S.D.C. E.D. Ill.	750,000.00	Nov. 27, 1962
	TOTAL—		$38,392,672.00	

* Cases so marked were initially instituted against the Company indicated by Trustees of the UMWA Welfare & Retirement Fund and in each instance the Company then filed a cross-claim against UMW.